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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 116

In the Matter of the Application

—of—

PAUL L. GAULT and MARJORIE GAULT, father and mother of GERALD FRANCIS GAULT, a Minor.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR APPELLANTS

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to provide by agreement for the discharge within the territorial limits of such counties or parts thereof of one or more governmental functions. Formerly § 26 of Art. 3 in part, renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938; amended and approved Nov. 6, 1945, eff. Jan. 1, 1946.

§2. [Counties; alternative forms of government for; effect of adoption thereof.]

(a) The legislature shall provide by law alternative forms of government for counties except counties wholly included in a city and for the submission of one or more such forms of government to the electors residing in such counties. No such form of government shall become operative in any such county unless and until adopted at a general election held in such county by receiving a majority of the total votes cast thereon in the county and if any such form of government provides for the transfer of any function of local government to or from the cities, the towns or the villages of the county, or any class thereof, it shall not take effect with respect to such transfer unless the transfer or the form of government containing it, shall also receive a majority of all the votes cast thereon in such cities, towns, villages, or class thereof, as the case may be.

[fol. 66] (b) Any such form of government shall set forth the structure of the county government and the manner in which it is to function. Any such form of government may provide for the appointment of any county officers or their selection by any method of nomination and election, or the abolition of their offices, and may also provide for the exercise by the board of supervisors or other elective governing body of powers of local legislation and administration and the transfer of any or all of the functions and duties of the county and the cities, towns, villages, districts and other units of government contained in such county to each other or to the state, and for the abolition of offices,

departments, agencies or units of government when all of their functions are so transferred without regard to the provisions of this article or any other provisions of this constitution inconsistent herewith.

(c) Except as provided in subdivision (b) of section 1 hereof nothing herein contained shall be deemed to impair or restrict the existing power of the legislature to enact laws relating to the government of a county or the cities, towns, villages, districts or other units of government therein contained until the adoption of a form of government by such county pursuant to subdivision (a) of this section.

(d) After the adoption of a form of government by a county pursuant to subdivision (a) of this section, no law enacted pursuant to subdivision (b) of section 1 hereof which abolishes or creates an elective office or changes the voting or veto power of or the method of removing an elective officer, changes the term of office or reduces the salary of an elective officer during his term of office, abolishes, transfers or curtails any power of an elective officer, or changes the form or composition of the elective body of such county, shall become effective until at least sixty days after its final enactment. If within such sixty days electors of the county in number equal to at least five per centum of the total number of votes cast in the county for governor at the last gubernatorial election shall file a petition with the county clerk or corresponding officer of the county protesting against such law, it shall become effective only if approved by the electors of such county at the next ensuing general election held at least sixty days thereafter, in the manner provided in subdivision (a) of this section for the adoption of a form of government.

(e) If under a form of government adopted by a county pursuant to subdivision (a) of this section the board of supervisors be abolished, the powers and duties of the board of supervisors, as prescribed by the constitution or by stat-

ute, if not provided for by such form of government shall devolve upon the elective governing body in such county.

(f) In a city which includes an entire county, or two or more entire counties, the powers and duties of a board of supervisors may be devolved upon the council or other legislative body of the city. Derived in part from former §26 of Art. 3, renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

[fol. 67] §3. [Existing laws to remain applicable.]

Existing laws applicable to the government of counties and the cities, towns, villages, districts and other units of government therein contained shall continue in force until repealed, amended, modified or superseded by law or by a form of government and, except as provided in subdivision (b) of section 2 hereof, nothing contained in this section shall be construed to impair the provisions of sections 9, 11, 12, 13, 14 and 15 of this article. Formerly subdivision 7 of §26 of Art. 3, renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

§4. [Further powers of local legislation and administration for counties; county auditors.]

The legislature shall, by general laws, confer upon the boards of supervisors, or other governing elective bodies, of the several counties of the state such further powers of local legislation and administration as the legislature may, from time to time, deem expedient. In counties which now have, or may hereafter have, county auditors or other fiscal officers, authorized to audit bills, accounts, charges, claims or demands against the county, the legislature may confer such powers upon such auditors, or fiscal officers, as the legislature may, from time to time, deem expedient. Formerly §27 of Art. 3, renumbered by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

• • • • • • •

§9. [Cities and villages; organization; powers to be restricted.]

It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, in such manner as shall secure to such cities and villages the powers granted to cities and villages by this constitution and, subject to the provisions of this constitution, to restrict the power of taxation, assessment, borrowing money, contracting debts, and loaning the credit of such municipal corporations, so as to prevent abuses in taxation and assessments and in contracting debt by such municipal corporations; and the legislature may regulate and fix the wages or salaries; the hours of work or labor, and make provision for the protection, welfare and safety of persons employed by the state or any county, city, town, village or other civil division of the state, or by any contractor or subcontractor performing work, labor or services for the state, or for any county, city, town, village or other civil division thereof. Formerly §1 of Art. 12, renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

[fol. 68]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62 C 821

April 8, 1963

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS, Plaintiffs,

—against—

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, Defendants.

OPINION—April 8, 1963

[fol. 69]

BRUCHHAUSEN, D.J.

The defendants move to dismiss the complaint on the grounds that (1) no substantial federal question is raised; (2) the Court lacks jurisdiction over the subject matter; (3) the complaint fails to state a claim upon which relief can be granted; (4) the Court should abstain from exercising its equitable jurisdiction; and (5) there has been a failure to join an indispensable party.

The Complaint

The plaintiffs in their various capacities as citizens, taxpayers and voters of Suffolk County, New York, seek (1) judgment pursuant to 28 U.S.C.A. Sections 2201 and 2202

[File endorsement omitted]

declaring invalid under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States, so much of Section 203 of the Suffolk County Charter which provides that the defendants, constituting the Board of Supervisors of said County, shall each have one vote as members of the said Board, and (2) an injunction to restrain the defendants from acting in [fol. 70] their collective capacity as such Board until a constitutional change in the voting system is duly made and adopted pursuant to applicable law.

Jurisdiction is asserted and relief requested both under the Civil Rights Act, 42 U.S.C.A. Sections 1983, 1988 and 28 U.S.C.A. 1343(3)(4). Plaintiffs seek the convening of a three-judge court, pursuant to 28 U.S.C.A. 2281 insofar as an injunction is sought restraining the enforcement or execution of a State statute.

It is alleged that each of the defendants resides in, and represents the voters of, one of the ten towns in Suffolk County; that the population of these towns varies from 1,367 to 191,280; that each defendant casts one vote without regard to the number of persons he represents; that the voting power is distributed solely on a geographic basis, that is one vote per town. It is further alleged that this arrangement arbitrarily exalts the voting strength of persons residing in the less populated towns, with no justification other than the present invidiously discriminatory geographic classification.

In Baker v. Carr, 369 U. S. 186, at page 199, the Court [fol. 71] held in part:

> "Article III, §2, of the Federal Constitution provides that 'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .' It is clear that the cause of action is one which 'arises under' the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that de-

prives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit,' Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579, or 'frivolous,' Bell v. Hood, 327 U.S. 678, 683. That the claim is unsubstantial must be 'very plain.' Hart v. Keith Vaudeville Exchange, 262 U.S. 271, 274.

At page 200 the Court further held in part:

"Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, §2, and so within the power of Congress to assign to the juris- [fol. 72] diction of the District Courts. Congress has exercised that power in 28 U.S.C. §1343(3):

'The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .'"

Mr. Justice Stewart in his concurring opinion at page 265 said in part:

"The Court today decides three things and no more: '(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes.'"

The fifth ground asserted for dismissal is not strongly urged nor is it tenable.

After due and careful evaluation of the allegations of the complaint and consideration of the authorities cited [fol. 73] by counsel which were examined and distinguished in Baker v. Carr, supra, the issues presented are of such a nature as to warrant the convening of a three-judge court. The allegations present a justiciable constitutional cause of action upon which the plaintiffs are entitled to a trial and determination. The right asserted is within the scope of judicial protection under the Fourteenth Amendment.

The motion is denied without prejudice to its renewal before the three-judge court. Settle order on five (5) days' notice, in compliance with 28 U.S.C.A. 2284.

Walter Bruchhausen, U. S. D. J.

[fol. 74]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS, Plaintiffs,

—against—

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, Defendants.

ORDER DENYING MOTION TO DISMISS—June 6, 1963

An application having duly come on to be heard for an order dismissing the complaint herein without assembling a three-judge court on the grounds that

(1) No substantial federal question is raised;

(2) The court lacks jurisdiction over the subject matter;

(3) The complaint fails to state a claim upon which relief can be granted;

(4) The court should abstain from exercising the equitable jurisdiction to consider the constitutionality of Sec- [fol. 75] tion 203 of the Suffolk County Charter, pending an authoritative interpretation by the courts of the State of New York of this legislation;

(5) The court should abstain from exercising its equitable jurisdiction for various reasons; and

(6) There was a failure to join an indispensable party, the State of New York or the legislature thereof;

And the plaintiffs having appeared by Frederic Block and Cahn and Cahn and the defendants having appeared by George W. Percy, Jr., Suffolk County Attorney, Stanley Corwin, of counsel, and the defendants having submitted the Notice of Motion dated October 17, 1962; the affidavits of Arthur M. Cromarty and Ruth Buys sworn to October 15, 1962; various exhibits; and memoranda of law in support of the motion; and the plaintiffs having submitted a memorandum of law in opposition thereto; and the court having heard oral argument on February 13, 1963 by Richard C. Cahn and Frederic Block for the plaintiffs and Stanley Corwin for the defendants; and due deliberation having been had and the court having rendered its decision in writing on April 8, 1963, and same having been filed in the Clerk's Office of this court on the same date;

Now, on motion of Frederic Block and Cahn and Cahn, it is

Ordered that the motion be and the same hereby is in all respects denied, without prejudice to a renewal thereof before the three-judge court to be convened pursuant to United States Code Title 28, Section 2281; and it is further

Ordered that the issues presented are of such a nature as to warrant the convening of a three-judge court to which [fol. 76] the plaintiffs are hereby declared entitled.

Walter Bruchhausen, United States District Judge.

[fol. 79]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULE 12(b), FEDERAL RULES OF CIVIL PROCEDURE—Filed September 6, 1963

Sirs:

Please Take Notice that upon the summons dated July 27, 1962, and the complaint herein, and pursuant to the order of Hon. Walter Bruchhausen, dated June 6, 1963, the undersigned will move before the three-judge statutory court designated herein by the order of Hon. J. Edward Lumbard, Chief Judge of the Court of Appeals for the Second Circuit, dated June 13, 1963, at Room 312, United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint herein on the following grounds:

1) no substantial federal question is raised;

2) the Court lacks jurisdiction over the subject matter;

3) the complaint fails to state a claim upon which relief can be granted;

[File endorsement omitted]

4) the Court should abstain from exercising the equitable jurisdiction to consider the constitutionality of §203

[fol. 80] of the Suffolk County Charter, pending an authoritative interpretation by the courts of the State of New York of this legislation;

5) the Court should abstain from exercising its equitable jurisdiction in view of the recent rejection of a constitutionally provided call for a constitutional convention and the even more recent approval of the electorate of Suffolk County of the Suffolk County Charter, such rejection and approval, respectively, having together constituted a political remedy in the exercise thereof, and

6) failure to join an indispensable party, the State of New York or the Legislature thereof,

and for such other and further relief as the Court may deem just and proper; and

Please Take Further Notice that upon said motion the defendants will rely on the affidavits and memoranda used upon the motion to dismiss made before the District Court.

Dated: Riverhead, New York, September 5, 1963.

Yours, etc.,

George W. Percy, Jr., Suffolk County Attorney, Attorney for the defendants, Office & Post Office Address, Suffolk County Center, Riverhead, New York 11902.

To:

Frederic Block, Esq., Office & Post Office Address, 305 Patchogue Road, Port Jefferson Station, New York;

Cahn & Cahn, Esqs., Office & Post Office Address, 425 New York Avenue, Huntington, New York;

Attorneys for the plaintiffs.

Affidavit of Service (omitted in printing).

[fol. 80a]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62-C-821

I. WILLIAM BIANCHI, JR., & ANO., Plaintiffs,

—against—

EVANS K. GRIFFING, ET AL., Defendants.

Transcript of Hearing of September 30, 1963

Before: Circuit Judge Moore, District Judge Bruchhausen, District Judge Dooling.

APPEARANCES:

Cahn & Cahn, Esqs., Frederick Block, Esq., Attorneys for Plaintiffs, By: Frederick Block, Esq.

George U. Percy, Esq., County Attorney, Suffolk County, Attorney for Board of Supervisors of Suffolk County, By: Stanley Corwin, Esq.

Robert Lowenberg, Court Reporter.

[fol. 80b] The Clerk: William Bianchi versus Evans K. Griffing, et al.

Mr. Corwin: We are ready for the motion.

Mr. Block: Ready.

Judge Moore: Very well. You may proceed.

ARGUMENT OF MR. CORWIN

Mr. Corwin: If the Court please, we are here this morning, and I think we can say rightly, because of the case of Baker against Karr or at least the facts which led up to

the institution of that now historic lawsuit, and yet I hasten to add that this is not strictly a reapportionment case as that was. Suffolk County is a Municipal Corporation in New York State. It is comprised of ten towns, and each of those towns elect a supervisor, who by virtue of that office becomes a member of the Board of Supervisors of Suffolk County. On that legislative and administrative body they each have one vote.

In the plaintiffs' complaint he notes, just to give an extreme example, that in the Town of Islip there are about 130,000 people, in the Town of Shelter Island on the contrary there are about 1,300. So that for every person that the supervisor of the Town of Islip represents, or rather [fol. 80c] the Town of Shelter Island represents, the supervisor of the Town of Islip has to represent 100 people to make his vote count.

Now, setting forth that they are in court pursuant to the Civil Rights Act seeking an injunction restraining the exercise of certain state offices and enforcing a state statute, they have asked for the convention of this three Judge court.

Their complaint goes on to say in detail what the powers of the Board of Supervisors in Suffolk County are, and they set forth that section of the Suffolk County Charter which is a special statute applicable only to Suffolk County.

Also, they set forth the statistics having to do with the population. They say that as a result of those population statistics, that we have here an example of very invidious discrimination with respect to the geography and the voting—the effect of the voting on the Board of Supervisors.

Now, their prayer for relief is that this Court take jurisdiction of the case. This was with reference of course to the application before the original District Court com- [fol. 80d] posed of one Judge, that a three Judge Court be convened. And then this will become important as the argument develops, that the judgment be granted first declaring invalid as in contravention of the 14th Amendment, Section

203 of the Suffolk County Charter. That is the section which says each supervisor will have one vote.

Also, declaring invalid the practice by which each defendants casts one vote, enjoining the defendants from acting until a constitutional change in their relative voting strength is made.

Now, that particular prayer for relief will become important when we talk about whether all of the necessary parties are before the Court. And that is also why we make the observation that this is not strictly a reapportionment case, because it appears that the relief the plaintiffs are seeking here is some method by which the votes of the supervisors are weighed, rather than that there be a change in the lines of the town boundaries or anything like that.

Pending that, of course, they ask that the Court retain jurisdiction, and they make the usual application for other further indifferent relief.

[fol. 80e] We are renewing a motion that was made originally before the one Judge Court asking that this complaint be dismissed on the ground that no substantial threat of question is made, the Court lacks jurisdiction of the subject matter, and that the complaint fails to state a cause of action upon which the relief asked for can be granted. And assuming that the Court says it has jurisdiction, we say that it should refrain from exercising its equitable jurisdiction on, among others, the grounds that the New York State Courts have not acted, that there is a practical remedy and that the people have exercised it twice recently —we will talk about that in more detail—and finally that there has been a failure to join a necessary party.

Judge Moore: Suppose the Court should deny the motion. Have the defendants any proof that they would wish to present upon any trial?

Mr. Corwin: I think that we can make a concession with respect to the facts that have to do with the population figures, that sort of thing. But in the second cause of action the plaintiffs make the charge that the charter was deliber-

[fol. 80f] ately contrived to deprive the people of the larger towns in Suffolk County from their constitutional rights, and with respect to that—and they have indicated in their brief that they intend to pursue that—we would certainly want to counter any evidence that they adduced along that line.

Judge Moore: Well, I would assume that criminal intent here is not a factor. I would think that the enactment of the charter plus the population figures would be the two most important facts or elements of the case. And certainly it would serve no purpose to call every member of the State Legislature and say what went on through your mind at the time, did you deliberately try to make the voter of the Town of Islip an underprivileged character, in a constitutional sense, and did you attempt to elevate the thousand or more people of Shelter Island into a position of great power. I don't think that would enter into it.

Mr. Corwin: I would think not. I would assume that the Court would not permit the plaintiffs to delve too deeply into the motivation of the Legislature.

[fol. 80g] Judge Moore: I don't think it would matter if it is bad on its face. To have 130,000 against 1000, those facts would speak for themselves.

Mr. Corwin: Yes.

Judge Moore: I was wondering at what stage, if the Court should deny the motion, either party proposes to present anything to us, because if that is going to take place would it not be better for the Court to consider the whole matter in one package rather than to try to pass on the question of law on the motion and then be told that the further facts are to be adduced to embellish the case.

For that reason the plaintiffs can speak for themselves, but I was just wondering what if any facts you had considered to submit to us.

Mr. Corwin: We do not have any, I would say, your Honor, to give you a brief answer. I think that we would stand on the law.

Judge Dooling: Perhaps we could ask plaintiffs' lawyer whether he intends to offer any evidence under paragraph 19.

Judge Moore: What about the plaintiffs' position?

[fol. 80h] ARGUMENT OF MR. BLOCK

Mr. Block: Your Honor, if the defendant is willing to make that concession, he is willing to rest upon the law in this matter, perhaps we can obviate the necessity of a trial, because we believe that the population disparity, such as the Court can take judicial notice of, that is the population figures create—

Judge Bruchhausen: Are both sides agreed on the population figures?

Mr. Block: I am not agreed to what the population figures on the Town of Islip are. I am not going to bicker about this.

Judge Dooling: You have settled the disparity of 1,300 to 150,000 or so, haven't you?

Mr. Block: I would settle for it even though it is not quite accurate.

Mr. Corwin: There is no dispute essentially. They are taking the census figures, and I think the Court should take judicial notice.

Judge Bruchhausen: We can take the census figures as substantially the figures of population.

Mr. Corwin: We will agree on even later figures, I am sure.

Mr. Block: I think we can enter into a stipulation that [fol. 80i] we would be happy, plaintiffs and defendants, to provide the Court with the most recent population figures, and we can stipulate to what these figures will be.

Mr. Corwin: That is correct.

Judge Moore: Other than that neither party desires to present any further proof except that contained in the papers?

Mr. Block: I would like to qualify that in one respect. There is an affidavit that has been submitted with the papers the Court has by Arthur Cromarty—

Mr. Corwin: Mr. Cromarty was one of the defendants and then the Chairman of the Board of Supervisors.

Mr. Block: The nature of these affidavits, from what I glean from them, is to point out to the Court that the defendant does not consider that regardless of whether or not there may be the inherent basis for discrimination, that as a matter of practice discrimination is not obtained, and we take serious issue with this. We don't think that this is really germane to the case. But if the Court considers it germane, we want to challenge that.

[fol. 80j] Judge Moore: As I read the papers and the affidavits, I don't think it makes any difference and I can't see how it would enter into our decision that these ten supervisors exercised their votes on certain questions one way and certain questions another way, and it wouldn't help the legal solution just to say that supervisor X was such a fine man that he always exercises his judgment fairly and squarely even though he came from Shelter Island, and supervisor Y wasn't influenced by the fact that he had 130,000 stalwart souls behind him.

Mr. Block: Of course, the supervisor of Shelter Island has commented to the press that they govern by intelligence and not by numbers. We would have to challenge that.

Judge Moore: It is just like three Judge Courts. We believe the same principle applies to us until the Supreme Court disagrees.

Mr. Block: However, if the defendant is willing to withdraw those affidavits, or if the Court feels that it will not consider it, then we will not find it necessary to challenge them.

[fol. 80k] Judge Dooling: There is one thing here. There is in the Cromarty affidavit a further statistical chart on assessed valuations and population trends.

Mr. Block: We have no objection to that.

Judge Dooling: Now, the rest of it, I take it what you are saying is that you could not assent to the logic and argument of Mr. Cromarty—

Mr. Block: No. This is why we are here today—

Judge Dooling: You will deny Buys' affidavit concerning that there were that many votes in those division of votes without drawing any influence from that?

Mr. Block: Exactly. In other words, we are prepared to show discrimination in practice as well as in theory. And I agree with the Court, though I don't think that it is really necessary for our lawsuit.

Judge Dooling: That is the question.

Do you plan to offer any factual evidence of discrimination in actuality as distinguished from disparity?

Mr. Block: Let me say this, your Honor: We feel that [fol. 801] we have a prima facie case. We are prepared to offer such evidence. We have noticed various people for examinations and depositions, and the Court has entered an order, subject to our stipulation, adjourning this until after the renewal of the motions.

We want to be prepared to do that because of the nature of the affidavits that have been submitted and because we feel we can show to the Court that there has been discrimination practices and—

Judge Dooling: Then you are in fine position to assert that you want two bites of the cherry. You are willing to have the facts taken as alleged, plus the Cromarty and Buys affidavits without contentious language, and if you lose on that basis you then want to reserve your right to call witnesses to show some actual discrimination.

Mr. Block: With your Honors' indulgence, I would like to rephrase that in this respect.

We feel that if the Court feels it is indispensable to our action to show discrimination in the application, as well as in theory, then of course we want to be in a position to [fol. 80m] proceed on that basis.

Judge Dooling: I should take it the Court would feel that it is essential to your case that you have a theory of your case which you now state and stand by.

Now, is this evidence of discrimination an essential part of your case that you mean to offer?

Mr. Block: I don't think so. I wasn't prepared to make this concession at this time. However, I am certain though of my theory.

Judge Moore: Following Judge Dooling's thinking out loud, which is a very dangerous practice I find, why would you need three Judges if all you are attacking is an alleged exercise by a Board of Supervisors of their powers one way or the other? I wouldn't think that that would get into the Federal Courts even for one Judge much less for three. All you are saying is that this proof that you might be willing to offer or might be willing to waive is to show that in certain instances they exercised their judgment in a way that you or others might disagree with.

Now I certainly don't think that falls in the ambit of any three Judge Court or a constitutional question. I should [fol. 80n] think you have enough to support your constitutional argument on the facts as you and Mr. Corwin have agreed upon.

Mr. Block: In that case, your Honor, we would be willing to stipulate that the population figures shall be agreed upon and that the affidavits will be used only for the purposes of gleaning from them information which Judge Dooling pointed out to the Court.

Judge Dooling: What might be called the static data in them rather than opinion argument and inference from them.

Mr. Block: Then I will stipulate to that.

Judge Bruchhausen: What about the second cause of action, counsel?

Mr. Block: The second cause of action is not indispensable to what we ask in our relief, and this of course would require additional proof.

I would be willing to stipulate that that cause of action be abandoned also if this Court takes jurisdiction.

Judge Dooling: Then that is abandoned, if the Court finds that it has jurisdiction over the first cause of action, [fol. 80o] in the light of the concession of the facts now made.

Mr. Block: Yes.

Judge Moore: Very well. Suppose you proceed, Mr. Corwin. I think we have brushed aside some of the non-essentials and we will try to stay on the main crime.

* * * * * * *

[fol. 84]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS,
Plaintiffs,

—against—

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. FLYNN, ARTHUR M. CROMARTY and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, Defendants.

OPINION—February 1, 1965

Before: Moore, U.S.C.J., Bruchhausen and Dooling, U.S.D.JJ.

MOORE, *Circuit Judge*:

Plaintiffs, I. William Bianchi, Jr., and Quentin B. Sammis, residents of the Towns of Brookhaven and Hunting-

[File endorsement omitted]

ton, Suffolk County, State of New York, bring this action in their own behalf and in behalf of all other taxpayers and voters of Suffolk County, against the ten individual defendants, each of whom is an elected Supervisor of his respective town and who collectively constitute the Board of Supervisors of Suffolk County (1) to declare void and invalid as violative of the Fourteenth Amendment of the United States Constitution so much of Section 203 of the Suffolk County Charter as provides that each Supervisor shall have one vote as a member of the Suffolk County Board of Supervisors; (2) to enjoin the defendants from acting as the Board of Supervisors unless and until a change in their voting strength is made; and (3) to cause to be convened a three-judge court to hear and determine the case (28 U.S.C. §2281, et seq.). A motion was made to dismiss the complaint upon the ground, amongst others, [fol. 85] that no substantial federal question is raised. The motion was denied without prejudice to renewal before a three-judge court, *Bianchi* v. *Griffing*, 217 F. Supp. 166 (E.D.N.Y. 1963). Thereafter, a three-judge court was convened and a hearing was held, upon which the motion to dismiss was renewed.

Many cases have been pending in the Supreme Court and in other courts arising out of the decision in *Baker* v. *Carr*, 369 U.S. 186 (1962) but despite the plethora of cases filed and the Supreme Court decisions of June 1964, there has been found no Supreme Court case which overturns the principle announced by that Court that section 2281 does not apply where "although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved." *Ex parte Collins*, 277 U.S. 565, 568 (1928). See also *Rorick* v. *Board of Comm'rs*, 307 U.S. 208 (1939); *Ex parte Public Nat'l Bank*, 278 U.S. 101 (1928).

The recent Supreme Court decisions (June 15, 1964)[1] have decided that "the seats in both houses of a bicameral

state legislature must be apportioned on a population basis." *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964); that such apportionment must be "sufficiently on a population basis to be constitutionally sustainable." *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653 (1964); and "the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act." *Lucas* v. *Forty-Fourth General Assembly of Colo.*, 377 U.S. 713, 736 (1964). The Court found "no significance in the fact that a non-judicial, [fol. 86] political remedy [such as initiative and referendum] may be available for the effectuation of asserted rights to equal representation in a state legislature." Ibid. In other words, the fact that "a majority of the people choose to do so," and that a "legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds* v. *Sims*." Id. at 737.

However, these cases all dealt with the election of state legislative bodies. To date the Court has not had to consider whether the Equal Protection Clause applies as well to the method of electing the officials of hamlets, villages, school, fire, sewerage and water districts, towns, cities or counties, whether, that is, the right to vote is protected by the Equal Protection Clause in its every exercise, or only in some restricted class of definably important voting occasions.

This Suffolk County case does not involve the election of members of the houses of the state legislature. It does attack, however, the provision of the Suffolk County Charter whereby the County Board of Supervisors, which has a local legislative authority, is to consist of the elected Supervisors of each of the county's ten towns.

The basic theory of the action is disparity of representation. Concerning disparity, there can be no question. The

ten towns of Suffolk were never of equal population; town lines were not drawn on a population basis and did not profess to be so drawn. In addition, over the years radical [fol. 87] population changes as a result of economic and industrial developments have taken place in eastern Long Island. The location of large defense plants in this area has brought thousands of families into the westerly towns of Suffolk County. The eastern area remains thinly populated; the western has become rather densely populated. Thus, for example, the town of Shelter Island finds itself about as it was 150 years ago with its population stabilized at some 1,300 persons whereas the towns of Islip, Huntington and Babylon, to take extreme cases, have some 172,000, 126,000 and 142,000[2] persons, respectively.

Each town has elected its chief executive officer (the supervisor) and no fault can be found with this practice. The trouble arises, so aver the plaintiffs, because the supervisors of the ten towns constitute the Board of Supervisors of the County which is the legislative body of the County. Little mathematical ingenuity is required to prove plaintiffs' thesis that the vote in County management affairs by the Supervisor from Shelter Island is representative of 1,300 persons whereas the equal vote of the supervisor of the town of Islip is representative of over 172,000 persons. The individual vote ratio is over 100 to 1 in favor of Shelter Island and against Islip. If county government within the States must conform to the Equal Protection Clause, as must congressional and legislative districts in the various States, then obviously *Baker* v. *Carr, supra,* and the June 1964 cases, *supra,* call for action. But first there is the fundamental question of how far should the federal judiciary go, or interest itself, in extending *Reynolds* v. *Sims* to local governmental bodies in [fol. 88] states the legislatures of which are now required to be apportioned on a population basis. The question is not easy to decide. Like so many legal problems, the solution may well be dependent upon degree.

Baker v. *Carr* and kindred cases presented fairly simple situations. State constitutions providing for a definite system of representation according to numbers were completely ignored. The legislatures which under their own constitutions should have made the changes required flagrantly refused to obey their own constitutional mandates. In view of such refusals, there seemed to be no other alternative than for the courts to assume this function. Thus, at one end of the popular representation spectrum there is the congressional and state district equality-of-vote-doctrine. At the other end could be taken the logical extreme of the election of village trustees from wards of unequal population: it may be doubtful that the federal judiciary would declare the method unconstitutional and forthwith order a general election by the village at large,[3] at least where a re-apportioned legislature exists and change is in the wind.

Between these two extremes lie the many minor governmental units referred to such as fire, water, sewer, school districts, towns, villages and cities. Somewhere in the middle ground falls this Suffolk County case.[4]

Pursuant to its constitutional authority, N.Y. Const., Art. IX, the New York State legislature has given to the counties of the State the right to have a county charter. Such a charter was enacted for Suffolk County and in 1958 [fol. 89] (election of November 4, 1958) the people of the county overwhelmingly adopted it. That Charter provides in section 201 for a County Board of Supervisors to consist of the supervisor of each town. By popular approval of the Charter in this form, defendants argue, the people of the county expressed themselves clearly and if there is to be any vestigial remainder to a government "of the people, by the people and for the people," such a vote should be sufficient proof of the wishes of the voters. But, if *Lucas* is to apply at all levels of local government and is not to be restricted to state legislative apportionment, voter approval would be of no value. Moreover, it may

well be that in voting for the "charter," the voters expressed only their approval of its general "home rule" advantages over the earlier system, or it may be that the voters had no clear conception of the fact that the charter preserved the power of a comparatively small percentage of the county's population to elect a potential majority of the county's legislative body. Had the spotlight of publicity been focused on this latter point, the argument from the vote at the 1958 polls would be more convincing.

I.

Defendants by their motion to dismiss raise the question of the power of a three-judge federal court to act in the premises. Assuming justiciability, is this provision of the Suffolk Charter of such statewide interest as to be within the jurisdiction of such a court? Relatedly, is a substantial federal question now presented? And is the [fol. 90] case, in any event, ripe for injunctive intervention? The cases which have had to deal with the problem of allegedly unequal representation in local-government elections have by no means given it uniform treatment.

In *Tedesco* v. *Board of Supervisors of Elections*, 43 So. 2d 514 (C.A. La., 1949), a resident of the Third District of New Orleans complained that approximately one-half the people of the City lived in the Third and Sixth Districts and were represented by only two-sevenths of the Commissioners in whom were vested administrative and executive powers for the City of New Orleans, and that the Louisiana statute producing the result violated the Fourteenth Amendment (United States Constitution). More specifically, the 8,508 voters of the Fifth District elected one Commissioner whereas the voters of the Third District numbering some 48,020 also elected one Commissioner. The court concluded that the statute was not violative of any provision of the Federal Constitution and affirmed the judgment dismissing the suit. An appeal to the Supreme Court was "dismissed for want of a substantial federal question." 339 U.S. 940 (1950).

In Michigan (*Johnson et al.* v. *Genesee County, Michigan, etc.*, 232 F. Supp. 567 [E.D. Mich. 1964]), the plaintiffs questioned the validity of a sewer improvement authorized by the affirmative vote of the Board of Supervisors of Genesee County on the ground that the Supervisors so voting represented less than a majority of the population of the county. There were serious imbalances in population representation on the Board, illustrated by [fol. 91] one township having some 30,000 inhabitants, another 2,000, yet each having one member on the Board. City representation showed an even wider disparity. The court denied the claim for injunctive relief and dismissed the amended complaint. In the opinion, it noted the June 15, 1964, rulings of the Supreme Court and the docketing there (32 L.W. 3331) of *Glass* v. *Hancock County Election Commission*, 156 So. 2d 825 (Miss. 1963) (appeal dismissed, 378 U.S. 558 (1964)), in which case the question was raised as to whether the failure to redistrict county supervisor districts, like the failure to reapportion state legislative districts, violated the Fourteenth Amendment where there is population disparity. The Supreme Court of Mississippi had affirmed the denial of injunctive relief on the theory that there was an adequate remedy at law, namely, available statutory procedure for redistricting. The Michigan District Court also considered *Griffin* v. *Board of Supervisors*, 33 Cal. Rptr. 101, 384 P. 2d 421 (Cal. 1964), wherein the court ordered the redistricting of the supervisorial districts of the county. In that case, the California state statute required the districts to be "as nearly equal in population as may be."

Recently in the United States District Court for the Southern District of New York, a plaintiff (a voter of the City of New York) sued the Mayor and other city officials and the Attorney General and Secretary of State of New York alleging that sections of the New York City Charter (Sections 61 and 62 of Chapter 3) were unconstitutional because the voting power of each member of the Board of

Estimate is weighted in favor of the less populated [fol. 92] Boroughs. The Board of Estimate, the City's principal legislative body, consists of the Mayor, the Comptroller, and the President of the City Council, each of whom has four votes and the Presidents of the five Boroughs each of whom has two votes. There is substantial disparity in the populations of the Boroughs. The convening of a three-judge court was sought pursuant to 28 U.S.C. §2281. Judge McLean denied the motion and, after pointing out that there was no unconstitutionality about the state statute authorizing the City of New York to have its own Charter, said: "That charter applies only to New York City. It is not a state statute of statewide application. The members of the Board of Estimate are city officials acting as such, not officers of the state. * * * It is clear under the authorities that this case does not fall within section 2281 and that the action should be tried in the regular way by a single judge, not by a three-judge court." *McMillan* v. *Wagner, Mayor of the City of New York et al.*, 64 Civ. 2160, September 12, 1964.

However, since the Supreme Court's June 15, 1964, decisions, there have been cases extending their principle to lesser units of government than state legislatures. In Michigan (*Brouwer, et al.* v. *Bronkema, et al.*, Circuit Court for the County of Kent, No. 1855, September 11, 1964), Judge Searl had to consider Kent County, the Board of Supervisors' of which consisted of supervisors from 22 townships and 8 cities in the county; the per capita representation of each supervisor was most disproportionate. In a comprehensive and well-reasoned opinion, Judge Searl [fol. 93] concluded that despite the enactment of the State's 1963 Constitution, "the Fourteenth Amendment voids the entire Michigan Plan."

On October 21, 1964, in an informal opinion wherein he, in effect, adopted Judge Searl's opinion, Judge Mize (*Damon, et al.* v. *Lauderdale County Election Commissioners, et al.*, Civil Action No. 1197-E, U.S.D.C. S.D. Miss.)

said that, "the Fourteenth Amendment is applicable to redistricting counties as well as the legislatures of the various states."

In *Ellis* v. *Mayor and City Council of Baltimore,* 234 F. Supp. 945 (D. Md., October 20, 1964), a voter class action, declaratory and injunctive relief was sought on the ground that both the existing and the proposed apportionment of the City Council were invalid. The district court decided that the principles applicable to the apportionment of state legislatures applied to the Baltimore City Council.

Most recently in *State ex rel. Harry L. Sonneborn, et al., Relators* v. *Richard L. Sylvester, County Clerk of Waukesha County, et al., Respondents,* filed January 5, 1965, the Supreme Court of Wisconsin held unconstitutional a provision of its state constitution providing for the composition of boards of supervisors on a town, ward and village basis which resulted in substantial disparities in voter representation. In so holding, the court said, "However, county boards possessing the type of legislative power which they do must be considered a unit of government which should be equally representative of the people of the county." And, "Since the composition of the legislature must conform to the principle of equal representation, it is logical that the arm or political subdivision of such legis- [fol. 94] lature enacting legislation should be governed by the same principle of equal representation."

After the three-judge court in *Johnson, et al.* v. *Genesee County, supra,* had returned the case to a single judge for decision (232 F. Supp. 563), Judge Roth wrote that "Under the rule of stare decisis [*i.e.*, he had concluded that "Under the prevailing view of the United States Supreme Court, * * * the composition of local units of government is held to be a state matter"], this Court is not free to consider the subject of the apportionment of representation on local legislative bodies." He qualified this pronouncement, however, with the prophecy that, "It may well be that the time will come when the application of the Fourteenth Amend-

ment will be extended that far. The more likely development is that the June 15, 1964, rulings of the Supreme Court in cases dealing with the state legislatures of Alabama, New York, Maryland, Delaware, Virginia and Colorado will result in legislatures in our states which will be proportionately representative of people and, therefore, likely to themselves establish in local legislative bodies a vastly different balance between people and governmental power." 232 F. Supp. at 572.

Probably mindful of such possible curative measures being enacted, Judge Searl (*Brouwer* v. *Bronkema, supra*) had said, "Consistent with the course indicated as proper in the *Reynolds* case, this court will defer any action by injunction or otherwise until the 1965 Legislature has had an opportunity to remedy the deviations from constitutional standards in the present Michigan provisions providing for the membership of the County Board of Supervisors. [fol. 95] The court will retain jurisdiction and in the event the Legislature fails to act, after it has had an adequate opportunity to do so, application may be made to this court for an appropriate remedy."

In the *Baltimore City Council* case (*Ellis* v. *Mayor, etc.*), *supra*, although the court enjoined any election in November 1964 pursuant to certain provisions of the City Charter found to be invalid, it nevertheless said, "We will not undertake a valid reapportionment of the City Council of Baltimore at this time. Under the existing Charter, municipal elections will not again occur until May, 1967. If Resolution No. 1 is adopted, municipal elections will not occur until November 1967. A general election will be held in November 1966. There is, therefore, ample time for the City Council to propose a valid scheme of reapportionment and submit it to the voters for adoption before the next municipal election will be held. We will, however, retain jurisdiction of the case pending the adoption and approval by the voters of a valid scheme of reapportionment of the City Council." (234 F. Supp. at 959.)

The counties in New York are not established nor are their boundaries drawn by the State Constitution; they are entirely creatures of the legislature. The legislature has the power to alter, amend or even abolish the present charter and its provisions for a Board of Supervisors. It could, as an illustration, create some other "elective governing body" to be elected on a county-wide basis or from election districts that it could define within the County, such body to function with respect to county legislative matters. A reapportioned legislature in New York may well decide that the mold of its creation be impressed upon [fol. 96] the counties. Even under the present county charter, the voters can initiate a charter amendment (County Law, §323). Moreover, a change in voting strength so as to equalize the supervisor representation can be effected by the supervisors themselves.

Under Section 33 subdiv. 5 of the Municipal Home Rule Law, the Board of Supervisors has ample power to provide for drafting charter amendments either under its own supervision, or under that of an officer of its designation or by a committee of its appointment or by a charter commission. Under Section 33 subdiv. 6 of the Municipal Home Rule Law, a petition by electors equal in number to ten percent of those who voted for the office of governor in the next preceding election can initiate a charter amendment by petition; the Board of Supervisors must then appoint a charter commission or put the matter to public referendum; if, on referendum, the county electors approve the appointment of a commission, the Board of Supervisors must appoint one.

When the voters in 1958 approved the Suffolk Charter and the supervisors rejected a change in voting strength in 1962, the populace was not so aware of the existence of means of redressing voting disparity as it is at present. The courts in the ensuing years have supplied many guidelines. Although no state officer is named as a defendant in this suit and even though we were completely satisfied

(which we are not) that no activity of the Board of Supervisors touches upon state interests, it would be unrealistic to ignore the similarity which exists between the selection [fol. 97] of state and county legislative bodies. In county-wide administration, just as in state-wide administration, the inhabitants of the populous areas should not be governed by representatives drawn from other and thinly populated areas.'

It is not for the courts to prescribe the type of representative government that is best suited to the needs of the voters of Suffolk County. The task of the courts is to determine whether particular methods transgress the Constitution. The formulation of schemes of representative government, in the first instance at least, is for the agencies of political action. If an invidiously disproportionate system is continued or approved, even if by a popular majority on referendum, as in *Lucas, supra,* the problems implicit in the present case will remain for judicial determination.

To deny federal jurisdiction here because state officials have not been made defendants will serve no useful purpose; the defect, if such, is remediable, and despite this deficiency, the constitutional problem remains. To dismiss the complaint without prejudice to a later action alleging substantial but unsuccessful efforts to alter the existing voting procedure by political means, seems needlessly technical. The framework of the action has been constructed. The issues are clearly defined. To retain jurisdiction in the three-judge court to await developments in the state legislature or within the County itself with respect to the selection of the County's legislative body, presents a third alternative.

It is not for this court to speculate about the type of representative government Suffolk County should have. [fol. 98] Suffice it to say that the Board of Supervisors is constituted to serve as the legislative body for the County and, upon the present undisputed population disparity, it is not representative of the voters of the County as the

Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause.

As stated, the solution of the present problem is, in the first instance, for the agencies of political action. It is not shown that effective and appropriate political action is fettered by any legal obstacle or rendered practically unavailable by any indurated political habit. It is inferable that the matter is ready for significant political action in the light of the analyses of governmental structure that have followed in the wake of *Baker* v. *Carr, supra,* and *Gray* v. *Sanders,* 372 U.S. 368 (1963).

If the same or a different but equally disproportionate system is continued, or is approved by a popular majority on referendum, the inquiry will not be at end; it will remain then to determine, if that occurs, whether apathy or even a popular majority can perpetuate or adopt a system that may be found to effect substantial disenfranchisement of voters in local-government elections.

Pending such events, the court will retain jurisdiction of the action with leave to the plaintiffs, in the event that an appropriate body has not been created for Suffolk County within the permitted standards for representation, to apply for further relief. At this time, it cannot be said [fol. 99] that the legislature is unaware of the problem nor, in the light of current court pronouncements, can it now be said that it has failed to act.

The motion to dismiss the complaint is denied.

An injunction at this time would serve no useful purpose; accordingly, the application therefor is denied without prejudice to renewal.

Feb. 1, 1965

Leonard P. Moore, U.S.C.J.; Walter Bruchhausen, U.S.D.J.; John F. Dooling, Jr., U.S.D.J.

[fol. 100] FOOTNOTES

[1] *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964); *WMCA Inc.* v. *Lomenzo*, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568 (1964); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed. 2d 595 (1964); *Davis* v. *Mann*, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed. 2d 609 (1964); *Roman* v. *Sincock*, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed. 2d 620 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed. 2d 632 (1964).

[2] 1960 census.

[3] *Robert R. McMillan* v. *Robert F. Wagner, Mayor of the City of New York and Chairman and a member of the Board of Estimate of the City of New York, et al.*, U.S.D.C. S.D.N.Y., 64-Civ.-2160, 9/12/64; *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, U.S.D.C., D.Md., 10/20/64.

[4] The whole area has been ably and thoroughly discussed by Professor Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 (1965).

[5] Section 7 of Article VII of the Michigan Constitution of 1963 reads:

> "A board of supervisors shall be established in each organized county consisting of one member from each organized township and such representative from cities as provided by law."

[6] The five least populous towns having approximately 10% of the county's population have five supervisors with voting strength equal to the five supervisors representing the remaining 90%.

[fol. 101]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

62 Civil 821

I. WILLIAM BIANCHI, JR., and
QUENTIN B. SAMMIS, Plaintiffs,

—against—

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, Defendants.

Before: Hon. Leonard P. Moore, Circuit Judge.

Hon. Walter Bruchhausen, Hon. John F. Dooling, District Judges.

ORDER AND JUDGMENT—March 3, 1965

Upon the complaint, all of the motion papers, papers in opposition thereto, plaintiffs' application for an injunction, defendants' motion to dismiss the complaint, proceedings in open court on September 30, 1963, and hearings on said application and motion, the Statutory Court consisting of Hon. Leonard P. Moore, Circuit Judge, and Walter Bruchhausen and John F. Dooling, Judges of this Court, in an opinion dated and filed February 1, 1965, having concluded the defendants were not entitled to dismissal of the complaint and the plaintiffs were not presently entitled to the injunction relief applied for, such opinion constituting the Findings of Fact and Conclusions of Law herein,

It Is Ordered and Adjudged

1. The plaintiffs' application for an injunction as prayed for in the complaint is denied without prejudice to renewal

[File endorsement omitted]

[fol. 102] in the absence, within a reasonable time, of the political action afforded governmental bodies to be taken as indicated in the Court's decision herein.

2. The defendants' motion to dismiss the complaint is denied.

3. Jurisdiction of further proceedings which may be found to be necessary in this Court is retained.

Dated: Brooklyn, New York
March 3, 1965

Leonard P. Moore, Circuit Judge; Walter Bruchhausen, District Judge; John F. Dooling, Jr., District Judge.

Affidavit of Service by Mail (omitted in printing).

[fol. 103]

United States District Court

For the Eastern District of New York

[Title omitted]

Notice of Appeal by Evans K. Griffing, et al. to the Supreme Court of the United States—Filed April 2, 1965

I. Notice is hereby given that Evans K. Griffing, William P. Bain, Lester M. Albertson, William J. Leonard, Stephen F. Meschutt, Ralph J. Osgood, Charles R. Dominy, Robert J. Flynn, Arthur M. Cromarty, and Thomas J. Harwood, constituting the Board of Supervisors of Suffolk County, New York, defendants above named, hereby appeal to the Supreme Court of the United States from the decree, order, and judgment herein dated March 3, 1965, insofar as said decree, order, and judgment denied defendants' motion to dismiss the complaint, retained jurisdiction and failed to deny the application for an injunction with prejudice. This appeal is taken pursuant to 28 U. S. C., §1253.

[File endorsement omitted]

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

[fol. 104] 1) Complaint.

2) Notice of Motion to Dismiss Complaint dated October 17, 1962.

3) Affidavit of Ruth Buys dated October 15, 1962.

4) Affidavit of Arthur M. Cromarty dated October 15, 1962.

5) Decision of Hon. Walter Bruchhausen, D. J., filed April 8, 1963.

6) Order of Hon. Walter Bruchhausen, D. J., denying motion to dismiss complaint, filed June 6, 1963.

7) Notice of Hearing on Plaintiffs' Application for an Injunction filed August 6, 1963.

8) Notice of Motion to Dismiss Compaint dated September 5, 1963.

9) Letter of Hon. Louis J. Lefkowitz, Attorney General, dated September 25, 1963.

10) Transcript of hearing on application for an injunction and on motion to dismiss held on September 30, 1963.

11) Decision of Statutory Court dated February 1, 1965.

12) Order and Judgment of Statutory Court dated March 3, 1965.

13) This Notice of Appeal.

III. The following questions are presented by this appeal:

1) Whether the district court erred in denying defendants' motion to dismiss the complaint.

2) Whether the district court erred in its failure to deny plaintiffs' application for an injunction with prejudice.

3) Whether the district court properly retained jurisdiction.

[fol. 105] 4) Whether Chapter 278 Laws of New York 1958 creating the Suffolk County Charter violates the Fourteenth Amendment of the Constitution of the United States.

Dated: March 23, 1965

George W. Percy, Jr., Suffolk County Attorney, Attorney for the Defendants, Address: Suffolk County Center, Riverhead, New York 11901.

Affidavit of Service by Mail (omitted in printing).

[fol. 106]

United States District Court

For the Eastern District of New York

[Title omitted]

Answer of Defendants—Filed March 22, 1965

The defendants answer the complaint as follows:

First Defense

This Court lacks jurisdiction on the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

Chapter 278 of the Laws of New York 1958 does not violate the Constitution of the State of New York.

[File endorsement omitted]

Fourth Defense

New York Constitution Article IX and New York County Law Article 6-A (both as in effect at the time of the commencement of this action) do not violate the Constitution [fol. 107] of the United States. The People of Suffolk County, voting in 1958 on the question of the adoption of the Suffolk County Charter pursuant to the provisions of Chapter 278 of the Laws of New York 1958, overwhelmingly approved the method provided therein for electing the members of the legislative body of Suffolk County.

Fifth Defense

There is no right under the Constitution of the United States or the Constitution of the State of New York guaranteeing to forms of local government below the state level, whether elected or appointed, and whether possessed of delegated legislative power or not, a republican form of government.

Sixth Defense

The granting of injunctive relief enjoining the defendants from acting in their collective capacity as the Board of Supervisors of Suffolk County until a constitutional change in their voting strength is made would deprive Suffolk County of all effective government and cause conditions that would be contrary to the best interests of the people thereof.

Seventh Defense

1. Defendants deny the allegations of paragraphs 7, 11, 12, and 13 of the complaint; admit the allegations of paragraphs 1, 2, 3, 4, 6, 8, 9, 10, 16, 18, and 19.

2. Defendants admit the allegations of paragraph 5 of the complaint, except that they deny members of the Suffolk County Board of Supervisors act as state officers.

[fol. 108] 3. Defendants deny the allegation of paragraph 14 of the complaint except they admit the revenues referred to are derived as stated.

4. Defendants deny the allegation of paragraph 15 except they admit the reasons alleged in part for the unequal growth rate and accept the characterizations of the eastern and western townships as being substantially correct.

Wherefore, defendants demand judgment that the complaint herein be dismissed and that they have their costs and disbursements of this action.

George W. Percy, Jr., Suffolk County Attorney, Attorney for the Defendants, Office and Post Office Address, Suffolk County Center, Riverhead, New York, by Stanley S. Corwin, Assistant County Attorney.

Riverhead, New York
March 19, 1965

Affidavit of Service by Mail (omitted in printing).

[fol. 125]

United States District Court

For the Eastern District of New York

[Title omitted]

Plaintiffs' Notice of Motion—Filed December 10, 1965

Sir:

Please Take Notice that upon the affidavit of Frederic Block, sworn to the 7th day of December, 1965, the affidavit of Robert J. Flynn, sworn to the 6th day of December, 1965, the decision of this Statutory Court dated February 1, 1965, the order of this Statutory Court dated March 3, 1965, and upon all the prior papers and proceedings had

[File endorsement omitted]

herein, the Plaintiffs shall move the Court at a place, date and time to be established by the Court for an order granting the following relief:

1. Declaring that no governmental body has taken any appropriate action to change the Defendant's form of representation as called for in the Court's decision of February 1, 1965 and order of March 3, 1965;

2. Further declaring that a reasonable time has passed since this Court's order of March 3, 1965, during which time the Defendant could have taken appropriate action;

[fol. 126] 3. Ordering the Defendant to forthwith change its form of representation to reflect the principles of equal representation as the United States Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause of the United States Constitution;

4. Enjoining the Defendant immediately from functioning under its present form of representation;

5. Ordering the Defendant immediately to count each Supervisor's vote on a weighted basis to reflect the population of the Town he represents, as a means of providing the Plaintiffs with provisional relief until the time when the Defendant changes its form of representation as called for in Paragraph 3, *supra;*

6. To retain jurisdiction to review any changes fashioned by the Defendant, or in the event no such changes are made by the next general election, to fashion permanent relief for the Plaintiffs;

7. For such different and further relief as the Court may deem just and proper.

Dated: Port Jefferson, New York, December 7, 1965.

Yours etc.,

Frederic Block, Attorney for Plaintiffs, Office and Post Office Address, 402 Main Street, Port Jefferson, New York 11777.

To:

George W. Percy, Jr., Suffolk County Attorney, Attorney for Defendant, Office and Post Office Address, Suffolk County Center, Riverhead, New York 11902.

[fol. 127]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FREDERIC BLOCK IN SUPPORT OF MOTION

State of New York,
County of Suffolk, ss.:

Frederic Block, being duly sworn, deposes and says:

I am the plaintiffs' attorney and am fully familiar with every facet of the subject action.

This affidavit is submitted in support of the plaintiffs' motion for the reconvention of the Statutory Court as detailed in the accompanying Notice of Motion.

On March 3, 1965, this Court ordered and adjudged that

> "The plaintiffs' application for an injunction as prayed for in the complaint is denied without prejudice to renewal in the absence, within a reasonable time, of the political action afforded governmental bodies to be taken as indicated in the Court's decision herein."

The order further denied the defendant's motion to dismiss the complaint. In addition, the Court retained jurisdiction of all further proceedings which may be found to be necessary.

On March 23, 1965, the defendant, Board of Supervisors of Suffolk County, appealed from this order to the United States Supreme Court. No concurrent appeal was taken to the U.S. Court of Appeals for the Second Circuit.

On July 2, 1965, the plaintiffs moved in the Supreme Court for the dismissal of the appeal on the ground that the appeal was not within the jurisdiction of the Supreme [fol. 128] Court because it was not taken in conformity to 28 U.S.C. Section 1253. This statute confers jurisdiction on the Supreme Court on a direct appeal from a Three-Judge Court order, but only from the "granting or denying, after notice and hearing, an interlocutory or permanent injunction. . . ."

While this Court's order denied the plaintiffs' application for injunctive relief, the plaintiffs did not appeal from this denial, and consequently, there was no appeal by either party from the "granting or denying" of an injunction.

The defendant's Jurisdictional Statement on its appeal to the United States Supreme Court further requested that if the Court refused to take jurisdiction of the appeal that it "pass an Order allowing additional time for filing notice of and an appeal to the U.S. Court of Appeals for the Second Circuit." (Appellant's Jurisdictional Statement at page 32.)

On October 11, 1965, the Supreme Court granted the plaintiffs' motion to dismiss and the appeal was accordingly "dismissed for want of jurisdiction." The Court did not grant the requested Saving Order to permit the defendant to appeal to a different court. Attached to this affidavit is a true copy of the Court's unanimous *per curiam* decision.

The defendant, Board of Supervisors of Suffolk County, never asked this Court or any other Court or Judge for a stay of this Court's order of March 3, 1965. The only action taken by the defendant was the abortive appeal to the Supreme Court which appeal so clearly lacked jurisdiction on its face that the plaintiffs must wonder whether it was interposed for dilatory purposes.

Thus, the plaintiffs now find themselves in the exact position they were in more than ten months ago, still waiting for the defendant to make some meaningful attempt to

comply with this Court's order of March 3, 1965. Certainly a "reasonable period of time" has elapsed since that date.

The accompanying affidavit of Supervisor Robert J. Flynn [fol. 129] reflects the apparent "do nothing" philosophy of the Board of Supervisors. It is almost one year since this Court's decision of February 1, 1965, and the only action taken by the defendant has been the appointment of some members to a supposed commission, which has yet to hold its first meeting. Moreover, the New York State Legislature has taken no action.

By comparison, neighboring Nassau County appointed a reapportionment commission shortly after this Court's decision, even though it was not under legal compulsion. This commission held extensive hearings, published both a majority and a minority report, and its efforts led to the adoption by the Nassau County Board of Supervisors of a proposition for a change in the Nassau County form of government which proposition was submitted by referendum to the people at the past general election.

When juxtaposed to Nassau's efforts, the defendant's efforts to comply, in any respect, with this Court's order are feeble and sugest a virtual disregard of this Court's mandate.

Wherefore, it is respectfully requested that the plaintiffs' relief be granted in its entirety.

Frederic Block.

Sworn to before me this 7th day of December, 1965.

Robert J. Burns, Notary Public, State of New York, No. 52-0509600, Suffolk County, Commission Expires March 30, 1967.

[fol. 130]

EXHIBIT TO AFFIDAVIT

SUPREME COURT OF THE UNITED STATES

GRIFFING ET AL., CONSTITUTING BOARD OF SUPERVISORS OF SUFFOLK COUNTY, N. Y. *v.* BIANCHI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 206. Decided October 11, 1965.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

[fol. 131]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ROBERT J. FLYNN IN SUPPORT OF MOTION

State of New York,
County of Suffolk, ss.:

Robert J. Flynn, being duly sworn, deposes and says:

I reside at 125 Bay Avenue, in the Village of Huntington Bay, Town of Huntington, County of Suffolk and State of New York. I am an attorney admitted to practice in the State of New York. Since January 1, 1960 I have been the duly elected Supervisor of the Town of Huntington and a member of the Suffolk County Board of Supervisors, the defendant in this action.

In the Spring of 1962, having served on this Board for more than two years from one of the most populous towns

of the County of Suffolk, I came to the conclusion that the present voting strength on the County Board was unfair to those townships with the larger populations. Prior to the commencement of this action I introduced a resolution pursuant to the provisions of the Suffolk County Charter calling for a change in the voting strength to a weighted vote procedure patterned after the Nassau County Charter. The resolution failed for lack of a second. This resolution, in substantially the same form, was re-introduced subsequent to the decision by the Supreme Court of the United States in *WMCA* vs. *Lomenzo*. It failed to obtain the necessary majority.

In the Spring of 1965, bearing in mind the decision of this Court in this action on February 1, 1965 and the entry of its order on March 3, 1965 requiring the adoption of a new form of government "within a reasonable time", I in- [fol. 132] troduced a resolution calling, in substance, for one Supervisor for approximately each 30,000 residents of the County. This resolution also failed to pass.

This subject has, therefore, been before the Board of Supervisors of Suffolk County for almost four (4) years. It is now almost eleven (11) months since the decision of this Court and the only action that has been taken was a resolution calling for the creation of a study committee in June of this year. This committee was to have twenty-five (25) members, two (2) to be named by each of the nine (9) Supervisors, plus five (5) to be appointed by the Presiding Officer of the Board, Supervisor Griffing of the Town of Shelter Island, with the other two (2) to be named by the County Executive. It should be noted that of the twenty-five (25) to be appointed, thirteen (13), or a majority, are to be named by Supervisors representing less than 8 per cent of the County's population, all of whom have been vigorously outspoken against any change in the voting strength of the Board of Supervisors. To the best of deponent's knowledge, although almost six (6) months have elapsed since the resolution calling for this

committee to be created, all twenty-five (25) members have not been appointed. It should also be noted that the Presiding Officer has designated as Chairman of this committee former Riverhead Supervisor William Leonard, an outspoken opponent of any change in the voting strength and a member of the Board in 1962 when deponent was unable to obtain a second to his original resolution.

Deponent respectfully refers the Court to the many occasions on which the Presiding Officer of the Board, Supervisor Griffing, had been quoted in the Press to the effect that he is unalterably and irrevocably opposed to any change of voting strength which would give greater voting strength to the heavily populated towns.

At both public and executive sessions of the Board of Supervisors, deponent has repeatedly urged the Board to take positive, affirmative and effective steps to comply with [fol. 133] the order of this Court. To the best of deponent's knowledge and belief, the aforementioned committee has never met, although ten (10) months have elapsed since the decision of the Court. In July of this year the attorney for the Plaintiff herein appeared at a public meeting and urged action in order that the Board might avoid making the Court do the Board's work.

In view of the foregoing, and taking into account the present requirements of the Suffolk County Charter, deponent is convinced that no concrete relief from the present voting inequities can be foreseen as long as the Board is constituted as it is at present.

Deponent respectfully submits that some impetus must be given to the Court's decision immediately if there is to be any relief within the foreseeable future. It is further submitted that some interim relief, possibly in the form of requiring a weighted vote by the present Supervisors until a new system is adopted, must be forthcoming if the dignity of this Court's decision is to be preserved.

Wherefore, deponent respectfully prays that this Court will grant the relief sought by the Plaintiff herein.

Robert J. Flynn.

Sworn to before me this 6th day of December, 1965.

Beverly R. Scheland, Notary Public, State of New York, No. 52-8799585, Suffolk County, Term Expires March 30, 1966.

AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 212]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANTS' CROSS-MOTION TO DISMISS COMPLAINT AND FOR OTHER RELIEF—Filed January 10, 1966

Sirs:

Please Take Notice that upon the affidavit of Stanley S. Corwin, sworn to the 7th day of January 1966, the complaint, answer, all of the papers heretofore filed and proceedings heretofore had, upon the judgment of the United States Supreme Court herein, and upon the proceedings before the Statutory Court on December 16, 1966, authorizing the filing of formal motions herein by way of cross-motion to the plaintiffs' motion for various relief dated December 7, 1965, the undersigned moves this Statutory Court for an order and judgment granting the following relief:

1. Dismissing the complaint herein on the ground the Court has no jurisdiction, pursuant to the order of the Supreme Court; or, alternatively,

2. Dissolving the Statutory Court; or, alternatively,

[File endorsement omitted]

3. Permitting the defendants to secure and file an amended answer, and

[fol. 213] 4. Granting summary judgment in favor of the defendants, and

5. Granting such other, further or different relief the Court may deem just and proper.

Dated: Riverhead, New York, January 7, 1966.

Yours, etc.

George W. Percy, Jr., Suffolk County Attorney, Attorney for the defendants, Office and Post Office Address, Suffolk County Center, Riverhead, New York 11901, by Stanley S. Corwin, Assistant County Attorney.

To:

Frederic Block, Esq., Attorney for plaintiffs, 402 Main Street, Port Jefferson, New York 11777;

Arthur Goldstein, Esq., Attorney for Intervening Plaintiff, Town of Huntington, 44 Elm Street, Huntington, New York.

[fol. 214]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF STANLEY S. CORWIN IN SUPPORT OF MOTION

State of New York,
County of Suffolk, ss.:

Stanley S. Corwin, being duly sworn, deposes and says:

I am associated with the attorney for the defendants and familiar with all of the proceedings herein, and make this affidavit in support of the defendants' cross-motion for

various and alternative relief, notice of which this affidavit accompanies, and by way of complying with the Court's request that it be supplied with facts about the Committee on Reapportionment.

With regard to the motions, sufficient facts are before the Court in the papers already filed, except as to the application for permission to serve and file an amended answer.

At the time of the oral argument before the Statutory Court on the plaintiffs' motion for an injunction and defendants' renewed motion to dismiss, on September 30, 1963, the following took place:

Judge Bruchhausen: What about the second cause of action, counsel?

Mr. Block: The second cause of action is not indispen- [fol. 215] sable to what we ask in our relief, and this cause would require additional proof. I would be willing to stipulate that that cause of action be abandoned also if this Court takes jurisdiction.

Judge Dooling: Then that is abandoned, if the Court finds that it has jurisdiction over the first cause of action, in the light of the concession of facts now made.

Mr. Block: Yes.

Judge Moore: Very well. Suppose you proceed, Mr. Corwin. I think we have brushed aside some of the non essentials and we will try to stay on the main crime.

The second cause of action in the complaint incorporated the first seventeen paragraphs by reference and included paragraphs 18th and 19th, alleging the discrimination charged was created by the affirmative act of the state legislature and that the Suffolk county charter was deliberately contrived to deny the plaintiffs and others of their constitutional rights.

Inadvertently, and doubtless with the defendants' concession on oral argument in mind, paragraphs 18 and 19 of the complaint were admitted in the original answer.

The proposed amended answer is attached hereto. It differs from the original answer only that it denies paragraphs 18 and 19. On the question of the plaintiffs' application for immediate direction to the defendants it should be noted in passing that the supervisor who introduced a local law providing for weighted voting was recently defeated at the polls in a bid for re-election. In its earlier decision, this Court observed that perhaps the people of the county were not aware of the significance of districting and apportionment and their approval of the charter could not be construed as approval of all the provisions, particularly representation on the legislative body. [fol. 216] It can no longer be said the people of the county are not generally aware of the problem, because it has been well publicized throughout the county. With that in mind we note that of the 10 defendants originally named, but three still remain on the board. In spite of the change there has been no direct attempt, other than that of ex-Supervisor Flynn, to change the representation on the board or the method of voting. A committee on reapportionment has been provided for and so that the Court may have factual data before it, as requested, the balance of this affidavit is devoted to that committee and what has transpired to date.

On May 10, 1965, the Suffolk County Board of Supervisors duly adopted the following resolution, which was forthwith approved by the County Executive:

"Whereas, the federal courts have heretofore rendered decisions calling for representation on legislative bodies to be in conformance with the provisions of the 14th Amendment of the United States Constitution; and

"Whereas, the Board of Supervisors has been made a party to such a suit calling for reapportionment of the voting strength of the members of the county Board of Supervisors of Suffolk County; and

"Whereas, the Board of Supervisors has been advised by such federal court to make some provisions that would more proportionately divide the vote following the principle of the Supreme Court decision requiring 'one man, one vote'; and

"Whereas, the Board of Supervisors of Suffolk County has heretofore confirmed the County Executive's direction to appeal said décison; and

"Whereas, in addition to said appeal that is pending in said federal court there is pending proposed legislation prepared by George W. Percy, Jr., County Attorney of Suffolk County, which would change and reapportion the voting strength and board representation at the county level; and

"Whereas, several alternative plans have been submitted by various individuals and members of this Board; and

"Whereas, after due consideration it is the concensus that all proposals be given consideration in the event that the pending appeal and/or legislation does require reapportionment; now, therefore, be it

[fol. 217] "Resolved, that the Presiding Officer of the Board be and hereby is empowered to appoint a nonpartisan committee whose purpose shall be to report to this Board as to its findings in keeping with the legal principles and expounded by the federal courts and/or state and federal legislation as it would affect the voting strength or representation of the various towns on the county level; and

"Be It Further Resolved that said committee be composed of not more than 25 persons who are representative of the interested points of view and having acknowledged background in community and local governmental activities and be residents of the County of Suffolk."

Each supervisor was asked to nominate two members and the county executive five. After the Supreme Court

ruled on the appeal taken to it, the chairman of the Board appointed those who were nominated, and designated as chairman William J. Leonard, a former supervisor. There were some declinations, and further appointments, and the committee held its first meeting on December 15, 1965, although not fully complemented.

The committee is bi-partisan. Its membership includes a number of attorneys knowledgeable in municipal affairs, and persons from all walks of life.

Invited to its first meeting were The Honorable John Burns, Commissioner of the Office for Local Government, and Milton Alpert, Esq., a director and counsel of the Office. They presented a thorough analysis of the problem and reviewed the pertinent cases.

On December 29, 1965, the Board of Supervisors adopted the following resolution which was immediately approved by the County Executive:

"Whereas, the Committee on Reapportionment, while not fully complemented, has held a preliminary meeting at which representatives of the Office for Local Government presented a basic review of the problem and outlined various approaches to the solution, and proposes to organize and embark upon the discharge of its function at its next meeting scheduled for January 5th, 1966; and

"Whereas, inquiry was made of the Chairman of the Committee as to the availability of funds for such supplies and paid personnel as might be necessary for the [fol. 218] Committee to function efficiently and expeditiously, which inquiry has been communicated to this Board; and

"Whereas, the Board is desirous that the Committee report to it as fully as possible at the earliest possible date; now, therefore, be it

"Resolved, that it is the sense of the Board of Supervisors that the Reapportionment Committee be requested to pursue its responsibilities and report as soon as pos-

sible, and that it is the intent of the Board to comply with the reasonable requests of the Committee for such funds as may be deemed necessary for supplies and paid personnel to the end that the work of the Committee may be completed without delay."

The reapportionment committee met again on January 5. There was a wide-ranging discussion and exchange of ideas. The committee was apprised of the willingness of the board of supervisors to afford them funds and its desire for prompt action. Suggestions were made study groups be appointed to ascertain the economic impact of increasing the membership of the legislative body, analyze governmental structures with emphasis on existing functions and ascertain the effect reapportionment would have on them, suggest what county functions should be districted.

Suggestions were made as to various reapportionment plans. They ranged from maintaining the present town supervisors and providing a weighted vote at one extreme, to completely doing away with town influence on the board by having supervisory districts on the other. Compromise versions, such as retaining the supervisors and adding supervisory district members, were offered.

The committee requested funds and facilities of the supervisors, agreed to receive and circularize for study the several plans offered and agreed to meet on February 3 for further deliberations.

The committee deferred the appointment of counsel for the time being, although it recognized the complexity of the technical changes that would of necessity be made in the county charter and possibly other laws.

[fol. 219] Deponent is a member of the committee and from first-hand knowledge of its activity is persuaded it is beholden to no one point of view and means to do a thorough job that will so far as possible reflect an acceptable compromise of the views of a wide segment of the public.

Neither the board nor the committee is dragging its feet. The problem confronting them is novel and exacting, and

the effects, changing as they will long established patterns of government, will be traumatic.

Certain the Court recognizes this, the defendants request they be afforded further time to receive, consider, and act upon the report of its committee on reapportionment.

Stanley S. Corwin.

Sworn to before me this 7th day of January, 1966.

Cornelia C. Keogh, Notary Public, State of New York, No. 52-2093890, Qualified in Suffolk County, Term Expires March 30, 1967.

[fol. 220]

EXHIBIT TO AFFIDAVIT

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

PROPOSED AMENDED ANSWER OF DEFENDANTS

The defendants answer the complaint as follows:

FIRST DEFENSE

This Court lacks jurisdiction on the subject matter of this action.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Chapter 278 of the Laws of New York 1958 does not violate the Constitution of the State of New York.

FOURTH DEFENSE

New York Constitution Article IX and New York County Law Article 6-A (both as in effect at the time of the commencement of this action) do not violate the Constitution [fol. 221] of the United States. The People of Suffolk County, voting in 1958 on the question of the adoption of the Suffolk County Charter pursuant to the provisions of Chapter 278 of the Laws of New York 1958, overwhelmingly approved the method provided therein for electing the members of the legislative body of Suffolk County.

FIFTH DEFENSE

There is no right under the Constitution of the United States or the Constitution of the State of New York guaranteeing to forms of local government below the state level, whether elected or appointed, and whether possessed of delegated legislative power or not, a republican form of government.

SIXTH DEFENSE

The granting of injunctive relief enjoining the defendants from acting in their collective capacity as the Board of Supervisors of Suffolk County until a constitutional change in their voting strength is made would deprive Suffolk County of all effective government and cause conditions that would be contrary to the best interests of the people thereof.

SEVENTH DEFENSE

1. Defendants deny the allegations of paragraphs 7, 11, 12, 18, and 19 of the complaint; admit the allegations of paragraphs 1, 2, 3, 4, 6, 8, 9, 10, and 16.

2. Defendants admit the allegations of paragraph 5 of the complaint, except that they deny members of the Suffolk County Board of Supervisors act as state officers.

[fol. 222] 3. Defendants deny the allegation of paragraph 14 of the complaint except they admit the revenues referred to are derived as stated.

4. Defendants deny the allegation of paragraph 15 except they admit the reasons alleged in part for the unequal growth rate and accept the characterizations of the eastern and western townships as being substantially correct.

WHEREFORE, defendants demand judgment that the complaint herein be dismissed and that they have their costs and disbursements of this action.

GEORGE W. PERCY, JR.
Suffolk County Attorney
Attorney for the Defendants
Office and Post Office Address
Suffolk County Center
Riverhead, New York

by /s/ STANLEY S. CORWIN
Stanley S. Corwin
Assistant County Attorney

Riverhead, New York
December 14, 1965

AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 223]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN P. KANE OF FEBRUARY 9, 1966

State of New York,
County of Suffolk, ss.:

John P. Kane, being duly sworn, deposes and says:

1. I am the duly elected Supervisor of the Town of Huntington, Suffolk County, New York, the intervenor-plaintiff in this action, having assumed such office on Jan-

uary 1, 1966. I respectfully urge this Honorable Court to grant to the plaintiffs the immediate remedy specified in the notice of motion of plaintiffs, Bianchi and Sammis, dated December 7, 1965.

The Position of the Town of Huntington

2. I make this affidavit in support of the immediate relief requested with the explicit and unanimous support of the Huntington Town Board and in the belief that the more than 162,000 citizens of my town are currently being deprived of fair, adequate and constitutional representation in their county government by reason of the malapportionment of the defendant Board of Supervisors. As a matter of fact, plaintiff, Quentin B. Sammis, is now a member of the Huntington Town Board, having been elected thereto on November 2, 1965 in the same election in which I was elected Supervisor. His participation in this suit was and is known to the people of the town. As the chief executive officer of a town which has recently (November 2, 1965) adopted the suburban town form of government, effective January 1, 1966 (Article 3A, Town Law), it is my duty to most urgently request that this Court effectively and promptly terminate the invidious discrimination against its residents.

[fol. 224]

Suffolk County's Non-Compliance With This Court's Mandate

3. The motion before the Court seeks in the first instance a declaration that a reasonable time has elapsed since this Court's decision of February 1, 1965 without appropriate action by any governmental body. The evidence supports the grant of such declaratory relief. The only specific action taken by the defendant Board since this Court's decision has been the creation of a committee on May 10, 1965. The resolution creating this committee is set out, pp. 3-4, of the January 7, 1966 affidavit of Stanley S. Corwin. Despite the fact that this committee was cre-

ated nearly nine months ago, its full membership has never been appointed. It did not hold its first meeting until December 15, 1965, the day before the oral argument on the present motion. The only other meetings so far held were on January 5 and February 2, 1966. The next meeting is scheduled for March 2, 1966.

4. I was present at the committee's January 5 and February 2, 1966 meeting. The committee is still in the process of organizing itself and attempting to define its function. It is now embroiled in a dispute among its members as to whether it has authority to study a split in the county. Defendant Griffing of Shelter Island, the presiding supervisor of the county board, appointed himself to the committee and now urges the committee to study a split in the county. (See *Newsday* article of February 4, 1966 annexed as Exhibit A). Southampton representative Sharretts urged the committee at the February 2 meeting to study a county split. Mr. Griffing told the committee on February 2 that he would submit a proposed plan of reapportionment which will call for the creation of two additional "supervisors", one to be elected at large by the five eastern towns and the other to be elected at large [fol. 225] by the west end. Defendant Griffing's plan would require concurrence of both new supervisors (who would vote by weighted vote!) as well as a majority vote of the existing board (who would continue to cast one vote each), to enact county-wide legislation.

5. It is incredible that the committee should be in doubt as to its functions at this late date since defendant Griffing is both chairman of the county board and a member of the committee; and since Deputy County Attorney, Stanley S. Corwin, is, himself, a member of the committee (see his affidavit of January 7, 1966, p. 6) and knows its powers because he has set forth the text of the resolution creating the committee in his affidavit which has been submitted to this Court.

6. It is also incredible that defendant Griffing should be urging upon the committee a plan of "reapportionment" which preserves the veto power of the east end minority. It should be pointed out to the Court that all of the serious plans submitted to the committee have been submitted by west end representatives, by New York State Commissioner of Local Government John Burns, or by County Executive H. Lee Dennison. The only east end plan is the veto plan proposed by defendant Griffing.

7. It seems clear to me that the committee, in the words of Huntington representative Lazer at the February 2 meeting, "is not going any place". I believe that no action will ever be taken by the committee despite the efforts of some individual members, or by the defendant board of supervisors, unless strong impetus toward reapportionment is created by this Court's ord... In fact, at the January 5 meeting of the Committee, Deputy County Attorney, Stanley S. Corwin told the committee that the committee was not working under a pressing time limit because his impression was that Judge Moore of this Court understood "that these things take time." Moreover, even [fol. 226] if the committee created by defendant Griffing had been specifically created as a "charter commission" (Municipal Home Rule Law § 33(5)), which it was not, it would have had merely advisory powers. It is uncertain what powers, if any, the present Suffolk County committee enjoys under New York law. And, lastly, it is obvious that, even should the committee at some future date make a specific recommendation to the county board as presently constituted, the east end representatives upon the board have every incentive and by their public and private utterances have given every indication of their intent, to decline to adopt any system which disturbs the veto power which they presently enjoy.

8. The only other "action" taken by the county board since February 1, 1965 has been to take an improvident appeal to the Supreme Court in this case, which the Su-

preme Court dismissed on October 11, 1965 for want of jurisdiction in that Court to hear it. No simultaneous appeal was taken by the county to the United States Court of Appeals, and the Supreme Court declined to grant the county board additional time within which to appeal to that court. Now, the county at this late date, moves to interpose an answer and renew its motion to dismiss this case for lack of jurisdiction. Significantly, at the hearing of September 30, 1963, Deputy County Attorney Stanley S. Corwin told this Court that the county did "not have any" facts, but would "stand on the law". It is an insult to the intelligence of this Court to claim this action lacks merit. See Ellis v. Mayor of Baltimore, (U. S. Ct. App. 4th Cir. Oct. 11, 1965) Under such circumstances, we submit that there has been no meaningful action by the county board since this Court's decision and order.

[fol. 227]

New York State's History of Effort
to Compel Local Reapportionment

9. The state legislature has the power to reapportion counties (Municipal Home Rule Law §34(4); yet the history of the state's efforts to produce local reapportionment has not so far been promising. Although the Attorney General of the state has officially stated that he has concluded that the "equal protection clause does and must apply to local legislative bodies," (Goldstein v. Rockefeller, 45 Misc. 2d 778, 257 N. Y. S. 2d 994, 1001); and the Secretary of State (see remarks of Deputy Secretary of State John J. Ghezzi delivered January 24, 1966, annexed as Exhibit B) and the Governor (see governor's veto message relative to Senate Bill, Intro. No. 4499, Print No. 5391, annexed as Exhibit C) have taken the same position, the legislature has so far failed to adopt any measure which satisfies the requirements of the law. Senate Bill, Intro. No. 4499, Print No. 5391, to be submitted to the Court herewith, was vetoed by Governor Rockefeller on

July 20, 1965 because in the Governor's opinion it was "artfully designed to provide the maximum opportunity for improperly motivated districting".

10. To sum up, three of the highest officials of the State of New York have taken the position that reapportionment of local government must be implemented without delay, and yet no effective state action has been taken. It would seem futile for the citizens of Suffolk County and the Town of Huntington to wait for political action by the state, which is currently involved in the implementation of reapportionment of the state legislature.

11. The history of local reapportionment in New York State, as it has unfolded, bears out our contention that local reapportionment has not been imposed by the state, but, where it has come about, it has been directed by the state courts on a city-by-city or county-by-county basis, in a large number of cases.

[fol. 228] 12. Indeed, the reapportionment of the state is now being accomplished under a court imposed deadline of February 15, 1966. Matter of Orans, 265 N. Y. S. 2d 49, modified —— N. Y. 2d ——.

This Court Should Grant an Immediate Remedy

13. The present discrimination against the residents of the west end of this county will continue for as long as the county board is controlled by the east end. There is no incentive for the eastern supervisors to do otherwise than retain the *status quo*. There must be immediate relief in order to force the board off center so it will be empowered to grant further and more appropriate relief to the under-represented citizens of the west end of this county. It is paralyzed in the situation in which it now finds itself for the reason that the five supervisors from the east end have the same total voting power and strength as those five representatives of the heavy west end population. The county executive, elected by the entire voting

population of the county, is specifically stripped of his right to vote upon any matter having to do with a change in the form or composition of the board of supervisors (Suffolk County Charter, §203).

Conclusion

14. In the case of Suffolk County, New York, any permanent reapportionment plan adopted by the board of supervisors or by the state legislature is subject to a permissive referendum [N. Y. State Constitution, Art. 9, Section 1 (h) (2); Municipal Home Rule Law, Art. 4, Section 34 (4)], which at the earliest date could be held at the general election of November 8, 1966. The situation as it presently continues will result, in my opinion, in either no recommendation being made by the committee of the county board, or by its making conflicting recommendations, or by [fol. 229] the board of supervisors doing nothing during the late spring and summer of 1966 with the result that insufficient time will remain to reapply to this Court for relief which could be submitted to the people at the November 8, 1966 general election. In my view the failure of the plaintiffs to obtain provisional relief upon entry of this Court's order necessarily will delay reapportionment of this county at least until the general election to be held in November, 1967, more than 5¼ years after the institution of this suit.

15. For all of these reasons, I respectfully pray that the application be granted; that this Court declare that a reasonable time has elapsed since its decision of February 1, 1965 without action by political bodies; and that this Court further direct the defendants to enact, by April 1, 1966, a charter law pursuant to the provisions of Municipal Home Rule Law §34 (4), changing the form of legislative representation to accord with constitutional standards, making such charter law subject to a referendum to be held at the general election to be held November 8, 1966;

that the Court further enjoin the defendants from functioning under the present system forthwith; and order weighted voting as a provisional remedy effective upon entry of this Court's order hereon; and that this Court retain jurisdiction to review any permanent reapportionment plan subsequently adopted by the defendant board of supervisors.

John P. Kane

Sworn to before me this 9th day of February, 1966.

Vilma M. Kane, Notary Public, State of New York, No. 52-7152415, Suffolk County, Commission Expires March 30, 1966.

East End Still Talks of Its Own Flag

By Ray Larsen and Maurice Swift

Shelter Island—Shelter Island Supervisor Evans K. Griffing said yesterday that the idea of Suffolk's five eastern towns' secession from the county as an alternative to reapportionment is gathering impetus, and that a study is under way to determine the effect of such a move.

"This idea hasn't been abandoned and it isn't about to be abandoned," Griffing said. "Sentiment to do it (secede) is increasing daily in the eastern townships." Thomas J. Harwood, special assistant to the board of supervisors, of which Griffing is chairman, is now compiling secession information, but he said he has not yet been asked to begin the needed in-depth studies of the financial problems which would be involved.

Griffing also said he would ask the bipartisan Suffolk Reapportionment Study Committee at its March 2 meeting to include secession in its studies. "Every facet should be covered in the study," he said. On Wednesday, Griffing asked the committee to look into the possibility of dividing the county into separate east and west districts. He described his plan as a compromise that would be probably acceptable to the five East End supervisors as a possible alternative to secession. As for Griffing's own six-man secession committee, which he formed in June, 1964, he said it had no plans to meet. "It would be pointless to meet until we know which way the die has been cast," he said. Griffing is an ex-officio member of the committee.

The reapportionment committee and the secession committee were both formed last year after a special three-judge federal court ruled last February that Suffolk's one vote per supervisor form of government was unfair and should be changed to conform to the Supreme Court's one man, one vote concept of government representation, in which population would have a direct bearing on the supervision over power on the board. Supervisors of the sparcely populated East End towns feel this would rob them of any voice in county affairs. As of January 1965, there were an estimated 816,990 residents in western Suffolk, and 76,480 in eastern Suffolk.

Meanwhile, Frederic Block, attorney for two taxpayers who have filed suit to compel reapportionment, said yesterday that he will submit to the three-judge federal court by Tuesday a motion to force the county to adopt a temporary weighted-vote system of government until a permanent reapportionment plan is devised. The reapportionment committee has set a deadline of May 4 for devising a reapportionment plan.

[fol. 231]

Exhibit "B" to Affidavit

Reapportionment in Towns and Counties

My subject is reapportionment in towns and counties. In the time allowed for this discussion, I can give you only a brief outline of some of the court decisions. They will show you how we got there—where we are—and what we know we can do now to comply with the mandate of one man-one vote. Please remember that if you are uncertain and confused, you are not alone. The courts are as uncertain and confused as we all are, as you will soon see.

In the case of Baker vs. Carr, decided in 1962, the U.S. Supreme Court ruled that apportionment of a state legislature was subject to judicial review. Needless to say, this precedent shattering decision marked the beginning of a flood of litigation. In June 1964, the U.S. Supreme Court ruled in Reynolds vs. Sims that a state legislature must be apportioned among districts which are substantially equal in population and that the vote of one person must carry weight equal to the vote of any other person—or in other words, one man-one vote. In this case, and in five subsequent ones including WMCA vs. Lomenzo, the court held that population is the sole standard permitted under the Federal Constitution for the apportionment of both houses of the legislature. Despite the far reaching effect of these decisions, the high court failed to lay down specific standards or guidelines along which law makers could comply with the court's order.

Accordingly, the New York Legislature enacted four alternate plans of reapportionment which in itself illustrates the confusion and uncertainty which beset the legislators in their efforts to comply with the court's mandate.

Of immediate concern to you here, of course, is the impact of the reapportionment mandate on local governments.

Prior to the Supreme Court's decision in the Tennessee case of Baker vs. Carr, there had been a sprinkling of cases involving local reapportionment in various parts of the country. However, these decisions were made in State Courts, relying on state laws rather than Federal Constitutional requirements. The Federal Courts, in fact, had chosen not to intervene in these matters.

[fol. 232] However, a few days after the Alabama case of Reynolds vs. Sims, the first reapportionment issue at the local level, using the equal protection clause of the Federal Constitution as the basis of attack, was raised in Kent County, Michigan.

In that case, the State Court took the position that there is no difference between state and local legislative bodies insofar as equal protection of the laws under the Federal Constitution is concerned.

In that case, and in one in Wisconsin in January, 1965, the courts held that supervisors were elected to represent people and not political units—not townships, not city wards.

The courts said in effect, in these cases, that the basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives and that county boards of supervisors, as agencies of representative government, should not be constitutionally immune from the requirements of the 14th Amendment.

Since the county governmental structures of both Michigan and Wisconsin are similar, though not identical, to those of New York State, these cases were and are of special significance to us.

In light of these historic changes in the concept of representative government, beginning at the state level and deemed by court decision to be similarly applicable at the local level, some counties and cities in New York State have undertaken to devise their own plans of reapportionment consistent with the Supreme Court's one man, one vote edict.

The City of Albany and the Counties of Monroe, Nassau, and Schenectady adopted reapportionment plans which were submitted to the voters for approval in November.

As you may know, Monroe County was ordered to reapportion and has reapportioned its districts for the election of members of the Board of Supervisors on a population basis, cutting into town and ward lines. The Town Supervisor is elected separately and he no longer is entitled to serve on the County Legislative body unless he is also elected as a member of such body.

[fol. 233] In two cases, regarding the Onondaga County Board of Supervisors (Barzelay and Carocci) the court directed reapportionment. It shortened the term of supervisor to one year. This decision to shorten the term, mind you, was made in December *after the election*. In Goldstein vs. Rockefeller in Monroe County, the court shortened the term of Supervisors on the County Board to one year but did not shorten the term of the Town Supervisor; however, this was done before nomination and election and the candidates knew the conditions. In Oneida County in the Treiter case which was decided in December, 1965, the court also shortened the term to one year. In all of the cases to which I have referred regarding the shortening of term, you will note that they were all decided in the Fourth Department.

However, with respect to the City of Binghamton which I am informed has now reapportioned, an application to the court to shorten the term of members of their legislative body was denied, the court stating that it had no authority to take such action. There you have it—three conflicting decisions by courts of equal jurisdiction. In the Shilbury case in Sullivan County, the court directed reapportionment and interim weighted voting until the approval of an adopted plan.

In Erie County, while an action was pending in connection with reapportionment concerning the Board of Supervisors, an Order to Show Cause was issued which, if

approved by the court, would authorize reapportionment by a referee. It is my understanding that the relief sought in the Order to Show Cause is not expected to be granted.

Reapportionment cases are now pending respecting many counties of our state including Albany, Clinton, St. Lawrence, Suffolk, Westchester, Ulster and others. Appeals from some of the decisions are also in process and looking into the future we can expect more cases and more appeals.

It was only too clear after Baker vs. Carr that state and local governments would become involved in a mess of litigation. We have witnessed in WMCA vs. Lomenzo a direct confrontation of judicial power between the Federal and State courts. In that case, the Court of Appeals ruled that Plan A was unconstitutional and that there be [fol. 234] no election for legislators under such plan in 1965 although a three judge Federal court had previously ordered an election under the plan. You all know that the Federal court immediately thereafter mandated the election and enjoined all persons and public officers from any interference therewith.

Pending now in the Court of Appeals is the appeal from Justice Culken's ruling that the legislature enact a plan of legislative reapportionment by February 1. Here we have another confrontation of jurisdictional power between what we have always regarded as two separate and equal branches of government. It is my opinion that the court by delaying its decision last week to February 15 was seeking to avoid the clash of power in the hope that a plan of reapportionment would be enacted by that time. What the court will do in the event a plan is not enacted in time is anyone's guess.

It is plainly evident from the review of these decisions that the courts will act to correct malapportionment if state and local legislatures refuse or neglect to do so. It is also clear that to meet the test of one man-one vote there must be substantial equality in population from districts of representation. We also know that if a plan of reapportion-

ment is enacted and approved by the voters, it can be successfully attacked in the courts if the plan does not meet the test of substantial equality. We know too that citizen population has also been acceptable as a standard when such figures are provided from a Federal census such as in New York.

Elections-at-large, although not advisable for a number of reasons in large districts of representation, also meet the test. We have also seen that the court has approved interim weighted voting pending the adoption of an approved plan.

In a Georgia case, the Federal District Court held that a 15% variation in population from the "norm" would be acceptable for its state legislature. In an Indiana case, a three judge Federal court ruled that 10% above or below the norm was acceptable.

[fol. 235] Fractional or weighted voting, simply stated, means that a representative elected under either basis casts a vote in a legislative body proportionate to the population he represents. There is some difference, however. Under weighted voting, the current members of a board of supervisors would be continued, each casting a vote proportionate to the population he represents.

Under fractional voting, political units such as a town or city ward having more population than others of their class in the county, would elect more than one representative, each with one vote, while single representatives would be elected from smaller towns or city wards, with each representative casting one vote or a fraction thereof, depending upon its population in relation to the norm. If either fractional or weighted voting were acceptable, your jobs would not be so difficult.

However, prevailing rulings indicate that neither fractional nor weighted voting would be acceptable as the basis for an approved plan of apportionment. Nor, I might add, have the courts indicated any willingness to approve as a population base—voters who voted—enrollment—or regis-

tration figures. In each case where such figures were rejected, the court pointed to the inequities which resulted from their use—directed reapportionment—but did not specifically outlaw their use.

To this point my objective has been to highlight for you what we can expect from the courts based upon their rulings. For the remainder of my discussion, my purpose is to remind you of the difficult task you face—the tools you now have for compliance and the help you can get from the Executive and Legislative branches of government.

Each county which has not already begun its work on reapportionment should get to work immediately. If an action or proceeding has not already been instituted in your county, you may be sure that one will. A county or city that undertakes in good faith to comply will be more likely to receive sympathetic understanding from the courts. I, therefore, urge you, if you have not done so, to appoint your committee to study and act on reapportionment. You should not wait until you have legislative authorization or a court mandate—your committee should be working now.

[fol. 236] Each Board of Supervisors of the 57 counties outside the City of New York and City Councils in 45 counties in an analysis made by the Office for Local Government—using the standard of substantial equality of population—require reapportionment. Such cities now have the power to redistrict their wards without any referendum; however, if the composition of the legislative body is changed, the local law making such a change is subject to mandatory referendum. However, in the case of the county, the problems are more complex and solutions far from easy. Counties having county charters, such as Erie, Onondaga, Oneida, Westchester, Nassau and Suffolk may reapportion by local law, subject to permissive referendum.

Counties without charters may reapportion their Board of Supervisors through the adoption of a county charter by local law, subject to mandatory referendum. If such

county has one or more cities, the referendum would have to carry in the cities, as well as the other areas of the county considered as one unit to take effect.

On an interim basis, a county without a charter may institute weighted voting by local law subject to a county-wide mandatory referendum.

In addition to meeting these legal requirements, in drawin a plan of reapportionment, one must bear in mind (1) its acceptability if tested in the courts, (2) good districting. Good districting requires that districts be compact and contiguous—have community of interest whenever practicable and have built-in protection against gerrymandering. This means, of course, that every attempt should be made to adhere to municipal lines whenever possible.

I am sure you are aware that last year two bills were introduced in the Legislature relating to reapportionment by local governments, neither of which were enacted into law. The one worth mentioning was recommended by the Reapportionment Committee of the Local Government Advisory Board and had the support of Governor Rockefeller. I have been informed that a similar bill will be introduced this year. Also, that the Committee on Reapportionment of Local Government Legislative Bodies, headed by Chairman Everett R. Dyer, will be reactivated. Avail yourselves of all the help you can get from the experts. They will be glad to help you.

[fol. 237] From all we hear and read, the Dirksen amendment on reapportionment will be one of the first orders of business in the Congress. It is my view that local governments will not get the relief they would need in time from such action to avoid the strict standards of compliance required by the courts. There are some who feel that the Constitutional Convention, which will convene in April, 1967, may come up with some ingenious scheme to lay your problems to rest. I am not so hopeful.

I know you will attend to the vast and complex problems you face with continuing vigor and determination, and that

you will find solutions that will preserve the principle of home rule and contribute to the strength and vitality of local government.

By—John J. Ghezzi, Deputy Secretary of State, Department of State, Albany, New York

Delivered at Supervisors' Association of the State of New York, Inc. meeting at the Concord Hotel, Kiamesha Lake, New York on January 18, 1966

[fol. 238]

EXHIBIT "C" TO AFFIDAVIT

FOR RELEASE IN THE AFTERNOON PAPERS
OF THURSDAY, JULY 22, 1965

ROBERT L. MC MANUS, PRESS SECRETARY
TO THE GOVERNOR

STATE OF NEW YORK

EXECUTIVE CHAMBER
ALBANY

July 20, 1965

MEMORANDUM filed with Senate Bill, Introductory Number 4499, Print Number 5391, entitled:

"AN ACT to amend the county law, in relation to the creation of a county legislature as the legislative branch of county government in lieu of the existing board of supervisors or other elective governing body and providing for the reapportionment, decennially, of its membership"

#484

NOT APPROVED

This bill would abolish the boards of supervisors in all the counties of the State, and would require the creation

of a county legislature consisting of members elected from districts drawn without following municipal boundaries.

The central defect of this bill is that—in mandating a particular form of legislative body in every county without regard to the demands imposed by differing local needs and conditions and without regard to the desires of local residents—the bill violates the principle of home rule.

Moreover, the bill is artfully designed to provide the maximum opportunity for improperly-motivated districting. For example:

—The bill does not require that the districts finally adopted be substantially equal in population.

—The bill does not require that such districts be contiguous and compact in form.

—The bill does not allow for non-partisan representation, or for representation of political parties other than the two major parties, on the commission which would recommend district lines to the local governing body.

—Most importantly, the bill explicitly forbids submission of proposed district lines to a vote of the people.

There is no doubt that the legislative structure of many counties will have to be adjusted to reflect the new rules, still in the formative stage, required by the "one-man, one-vote" principle. But it does not follow that the State has any right or duty to select one of the many possible avenues of achieving that principle and to require all counties to adopt that form. Rather, the State's duty is to enact laws giving to counties adequate power so that counties can effectuate such compliance themselves, in the light of local conditions and local desires.

It is deplorable that, despite my recommendation, the Legislature chose to pass this bill, instead of the bill recommended by the Reapportionment Committee of the Local Government Advisory Board which (1) carried out the principle of "one-man, one-vote", (2) was consistent with the principle of home rule, (3) provided for a referendum

of the people, and (4) was supported by representatives of every level of local government in the State. The Legislature's gross failure means that some counties in the State may not now possess adequate powers to take local action to reconstitute their legislative bodies.

Nevertheless, all counties do have some power to take action under existing laws, such as by adopting a county charter, and counties may appoint commissions or committees to begin to plan for any necessary change. I know that the Office for Local Government stands ready to provide appropriate assistance on request and I trust that a proper bill on local reapportionment can be given early consideration at the next Legislative Session.

Disapproval is recommended by the Office for Local Government, the Local Government and Advisory Board, the County Officers Association, the Association of Towns and the Association of the Bar of the City of New York, among many others.

The bill is disapproved.

(Signed) NELSON A. ROCKEFELLER

[fol. 239]

EXHIBIT TO AFFIDAVIT

STATE OF NEW YORK

Print. 5391 Intro. 4499

IN SENATE

May 6, 1965

Introduced by COMMITTEE ON RULES—read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT

To amend the county law, in relation to the creation of a county legislature as the legislative branch of county government in lieu of the existing board of supervisors or other elective governing body and providing for the reapportionment, decennially, of its membership

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The county law is hereby amended by inserting therein a new article, to be article one-a, to read as follows:

ARTICLE 1-A

County Legislature

Section 10. Purpose of article.

11. County reapportionment commission.

12. Commission; members; appointment.

13. Commission; powers; duties; expenses.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

[fol. 240]

14. County legislature; membership; term of office; election.

15. Vacancies in county legislature.

16. Division of county into districts.

17. Report and termination of commission.

18. Adoption of local law providing for election of county legislators.

19. County legislature; functions, powers and duties.

20. County legislature deemed finance board.

21. County legislators; powers and duties.

22. County legislators; compensation.

23. County legislature; meetings.

24. County legislature; chairman; acting chairman.

25. Inconsistent laws repealed and superseded.

26. Separability clause.

§ 10. Purpose of article. During the past half century, numerous powers of government have been granted to county governments by the legislature in order to enable counties to cope more adequately with the increasingly complex problems of our modern society. The assumption of these responsibilities by county officials and county government has done much to promote our society and to bring great benefits to the people of this state. The growth in population of this state, while rapid, has not been evenly distributed throughout the various cities and towns in the state. The result is that there is a great disparity in population among towns and wards of cities. Since each ward and each town, except the town of Hempstead, has but one supervisor and one vote, there exists a situation which is not consistent with the concept of "one person one vote" as enunciated in the recent decisions of the supreme court of the United States. Therefore, it is incumbent upon the legislature to carry out the mandate of the supreme court of the United States and to develop a system of government on the county level which is consistent with the concept of "one person one vote". It is for this purpose that this article is enacted.

§ 11. County reapportionment commission. Subject to the restrictions in the constitution, the board of supervisors or other elective governing body of every county, except a

county wholly included within a city, shall on or before July first, nineteen hundred sixty-six and the county legislature shall, on or before July first of every year the number of which ends in two, adopt a local law or resolution providing for the establishment of a county commission to make a thorough study and investigation, including the gathering of data, the preparation of maps and charts and the compilation of other information which in the judgment of the county commission may be of value to the end that such necessary study and work will be available for use and shall be used by the commission for the purpose of recommending to such board, body or legislature, as the case may be, a method of electing county legislators from districts of substantially equal population.

§ 12. Commission; members; appointment. Such county commission shall consist of at least eleven members to be chosen by the chairman of such board, body or legislature of the county in the event the office of county executive has not been created. In the event the office of county executive has been created, such appointments shall be made by the county executive. The appointing officer of the county, [fol. 241] *insofar as practicable, shall appoint members to the commission so that the various units of government within the county may be represented on the commission. The commission shall consist of persons from each of the two major political parties in the state.*

§ 13. Commission; powers; duties; expenses. The members of the county commission shall serve without compensation. The chairman and vice-chairman of the county commission shall be designated by the appointing officer. The county commission may employ and remove counsel and such other assistants as may be necessary in carrying out the work as hereinafter provided and fix their compensation subject to the approval of such board, body or legislature of the county. Such county commission may sit anywhere within the state and may conduct public and/or private hearings. Said commission shall have the

power to compel the attendance of witnesses and the production of any books, papers and documents appertaining to the subject of its study and investigation, which in the judgment of the county commission may be deemed necessary. The members of the commission shall be entitled to their reasonable and necessary expenses in the performance of their duties. All authorized expenses of the commission shall be a county charge and shall be paid or reimbursed after approval by such board, body or legislature of the county.

§ 14. County legislature; membership; term of office; election. The county legislature shall consist of not less than five members, the actual number to be determined by such board, body or legislature of the county, as the case may be. The term of office of the members of the county legislature shall be two years, except as otherwise provided by law, and shall begin on the first day of January next following their election. Said elections for county legislators shall be conducted in each odd-numbered year.

§ 15. Vacancies in county legislature. A vacancy occurring in the county legislature shall be filled by appointment by the chairman of the county legislature, except in those counties in which there is a county executive officer, in which case he shall fill such vacancy by appointment. When a vacancy shall occur, it shall be filled for the unexpired term at the next general election held not less than three months after such vacancy occurs.

§ 16. Division of county into districts. The county reapportionment commission shall divide the county into not less than five districts, the actual number to be determined by it. Such districts shall be so adjusted or altered that each district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable and shall consist of contiguous territory. In establishing said districts, the commission shall give recognition to existing city, village or town lines.

§ 17. Report and termination of commission. The report of the county reapportionment commission shall be submitted to such board, body or legislature of the county, on or before March first next succeeding the date of the creation of such commission. Upon the submission of its final report, the existence of the county reapportionment commission shall be terminated.

§ 18. Adoption of local law providing for election of county legislators. Upon submission of the county re- [fol. 242] *apportionment commission's final report containing the district recommendations of the reapportionment commission, such board, body or county legislature, as the case may be, shall, within sixty days, pursuant to the provisions of the municipal home rule law, adopt a local law providing for the election of county legislators at the next election from the districts recommended by the county reapportionment commission or from such other districts as such board, body or county legislature shall, in its judgment, establish as consistent with the purpose and intent of this article. Members of the county legislature shall be known as county legislators and shall be elected one from each of the districts fixed by such board, body or legislature of the county. Members of the county legislature shall be nominated at the primary election held in the respective districts from which they are to be elected in the same manner as other county officers are nominated pursuant to the provisions of the election law. Notwithstanding any provisions of the municipal home rule law, any local law adopted pursuant to the provisions of this section shall not be subject to a mandatory or permissive referendum.*

§ 19. County legislature; functions, powers and duties. Upon the assumption of office of the county legislators, the prior elective governing body of the county shall be abolished and superseded by the newly created county legislature. Whenever the term "county board", "board of supervisors", "county governing board", "elective governing body of the county", is referred to in any law it shall be deemed to mean and refer to the county legislature. The

county legislature shall have and exercise all of the functions, powers and duties that were possessed by and shall be subject to the same rules and procedures as applied to the prior elective governing body of the county. It is not the intention of this article to abolish, supersede, curtail or in any way affect any powers or rights heretofore conferred upon or delegated to the board of supervisors or other elective governing body of a county, nor shall the provisions of this article be construed as superseding any provisions of any law relating to the functions, powers, duties, rights, methods or procedures of the prior elective governing body, unless a contrary intention is clearly manifested from the express provisions of this article.

§ 20. County legislature deemed finance board. The county legislature shall be deemed to be the "finance board" within the meaning of the local finance law.

§ 21. County legislators; powers and duties. Upon the assumption of office of the county legislators, such county legislators shall have all of the powers, duties, rights and privileges as were held by members of the prior elective governing body. Each member of the county legislature shall be entitled to one vote and shall have the same voting rights as existed in the prior elective governing body.

§ 22. County legislators; compensation. The compensation of the members of the county legislature shall be fixed by the county legislature but no increase in such compensation shall become effective until the official year following the next election at which county legislators are elected. However, the board of supervisors or other elective governing body of the county may fix the initial compensation [fol. 243] *of county legislators prior to the election of such legislators.*

§ 23. County legislature; meetings. The members of the county legislature shall meet at the county seat on the first Monday after the first day in January following their election. Thereafter, the county legislature shall meet at such

times as may be prescribed by it by resolution. Special meetings may be called by the county executive or as provided by the rules of the county legislature.

§ 24. County legislature; chairman; acting chairman. The county legislature shall choose from its own number a chairman, who shall preside at all meetings of the county legislature. The chairman shall have and may cast the vote to which he is entitled as a member of the county legislature. The county legislature shall appoint an acting chairman who shall serve as chairman in the absence or disability of the chairman.

§ 25. Inconsistent laws repealed and superseded. All acts or parts of acts, general, special or local, are hereby repealed and superseded to the extent that the same are inconsistent with the provisions of this article.

§ 26. Separability clause. If any clause, provision, sentence, paragraph, section, subdivision or part of this article shall be adjudged by any court of competent jurisdiction to be invalid, it is hereby declared to be the legislative intent that such judgment shall not impair, affect or invalidate the remainder thereof, but shall be confined in its operation to the clause, provision, sentence, paragraph, section, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 2. The law revision commission is hereby authorized and directed to make such studies and researches as may be necessary to formulate legislation effecting such revisions in the general, special and local laws of the state and of its political subdivisions as may be desirable or proper in view of the changes in the legislative branch of the county government effected by article one-A of the county law, as added by this act, and to submit such legislation for enactment by the legislature not later than January fifteenth, nineteen hundred sixty-six.

§ 3. This act shall take effect immediately.

[fol. 244]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN P. KANE OF FEBRUARY 10, 1966

STATE OF NEW YORK,
COUNTY OF SUFFOLK, *ss.*:

JOHN P. KANE, being duly sworn, deposes and says:

1. I am the Supervisor of the plaintiff, Town of Huntington, and make this further affidavit in support of the plaintiffs' request for immediate relief.

2. After my earlier affidavit was executed, Radio Station WGSM, of Huntington, New York, broadcast a news release which was apparently given to the press by Supervisor Evans Griffing, of Shelter Island, and Lester Albertson, of Southold. A copy of the news release, as it appeared upon the United Press International News teletype late last night or early this morning is annexed as "Exhibit AA" to this affidavit. The Court will note that these two east end supervisors have taken the public position that the four plans which they announced they would submit to the Citizens Reapportionment Committee on March 2 "are the only ones the eastern supervisors have found acceptable".

3. I respectfully submit to the Court that none of the four plans which the east end supervisors say they will propose comply with the mandate of this Court. The first plan would leave the Town of Riverhead with its minuscule population in possession of many hundreds of millions of dollars of Suffolk County improvements paid for largely [fol. 245] by the citizens and taxpayers of the western townships. There is, moreover, little precedent, if any, for eliminating county government altogether in the State of

New York, and we respectfully submit that such a plan would be completely unworkable.

4. The second plan calls for the split of the county and, thus, corroborates my comments in my earlier affidavit in which I indicated that the east end supervisors had embroiled the reapportionment committee in a dispute as to whether or not the county should discuss reapportionment or secession or both. It now appears that the east end supervisors are more interested in splitting Suffolk County into two counties than in properly, fairly and constitutionally apportioning the present county.

5. The Third plan presently publicized by the east end supervisors is evidently the same plan mentioned by defendant Griffing at the February 2, 1965 meeting of the reapportionment committee. It is absurd to think that the mere device of creating two additional supervisors, one for the west end and one for the east end, with the west end supervisor at large having a greater number of votes than the east end supervisor at large, will solve the problem of underrepresentation in this county. Especially is this so when one examines the Griffing plan and finds that he will insist upon the concurrence of both supervisors at large, as well as the vote of the majority of the presently constituted board of supervisors to enact county-wide legislation. It, of course, makes no difference how few votes the eastern supervisor at large casts, if his concurrence is required with respect to all county legislation.

6. The last plan presently proposed by Supervisors Griffing and Albertson is to create a bicameral legislature. I understand that the New York State Office for Local Government has specifically refused to sanction such plan as a [fol. 246] proper, appropriate or constitutional plan upon the county level of government. Indeed, the United States Supreme Court in *Reynolds* v. *Sims,* 377 U. S. 533 (1964) specifically held that both houses of a bicameral state legislature must be apportioned on the basis of population.

7. Now that the east end supervisors have indicated that these four plans are the only plans which they have found acceptable and it appears that these four plans are the only ones which they will propose to the reapportionment committee, it becomes much more urgently necessary for this Court to grant the immediate relief requested in the notice of motion and in my earlier affidavit. If it was never apparent before, it is apparent now that reapportionment of Suffolk County, New York will never take place if that task is left to the board of supervisors as presently constituted. This Court's mandate will continue to be ignored by the board of supervisors until this Court directs compliance therewith.

John P. Kane

Sworn to before me this 10 day of February, 1966

Sally Zaza
Notary Public, State of New York
Qualified in Suffolk County
No. 52 4381525
Commission Expires March 30, 1967

[fol. 247] EXHIBIT "AA" TO AFFIDAVIT

(RIVERHEAD)—TWO EASTERN SUFFOLK COUNTY SUPERVISORS WILL SUBMIT FOUR REAPPORTIONMENT PLANS AT THE NEXT MEETING OF THE CITIZENS REAPPORTIONMENT COMMITTEE AT THE COUNTY CENTER IN RIVERHEAD ON MARCH 2.

EVANS K. GRIFFING, SUPERVISOR OF SHELTER ISLAND AND COUNTY BOARD CHAIRMAN, AND SOUTHOLD TOWN SUPERVISOR LESTER M. ALBERTSON SAID ALL FOUR PLANS ARE ACCEPTABLE TO THEM AND OTHER EAST END SUPERVISORS.

THE FIRST PLAN WOULD ELIMINATE COUNTY GOVERNMENT ALTOGETHER AND DIVIDE FUNCTIONS BETWEEN TOWN AND STATE. THE SECOND PLAN WOULD SPLIT THE COUNTY HAVING THE FIVE EASTERN TOWNS "SECEDE" FROM THE FIVE WESTERN COMMUNITIES.

THE THIRD PLAN WOULD DIVIDE SUFFOLK INTO TWO DISTRICTS, EACH ELECTING FIVE SUPERVISORS IN ADDITION TO A SUPERVISOR AT LARGE. UNDER THIS PLAN, THE WESTERN SUPERVISOR WOULD HAVE TEN VOTES AND THE EASTERN SUPERVISOR ONE.

THE FOURTH PLAN WOULD BE TO CREATE UPPER AND LOWER HOUSES. THE BOARD OF SUPERVISORS WOULD BE THE SENATE WITH EACH MEMBER HAVING ONE VOTE.

THE LOWER HOUSE WOULD CONTAIN ABOUT 18 REPRESENTATIVES.

A THREE-MAN FEDERAL COURT PANEL HAS ORDERED SUFFOLK TO COME UP WITH A REAPPORTIONMENT PLAN THAT ADHERES TO THE ONE-MAN, ONE-VOTE PRINCIPLE.

THE MEETING MARCH 2 WILL BE THE FOURTH BY THE CITIZENS REAPPORTIONMENT COMMITTEE. THESE FOUR PLANS ARE THE ONLY ONES THE EASTERN SUPERVISORS HAVE FOUND ACCEPTABLE.

RH937PES

[fol. 248]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

I. WILLIAM BIANCHI, JR., and
QUENTIN B. SAMMIS, Plaintiffs,

—against—

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, Defendants.

OPINION—June 15, 1966

Before: Moore, U.S.C.J., Bruchhausen and Dooling, U.S.D.JJ.

Moore, Circuit Judge

This proceeding was commenced on July 27, 1962. After hearing argument on September 30, 1963, a judgment was entered on March 3, 1965 wherein, although the injunction sought in the complaint was denied, the denial was "without prejudice to renewal in the absence, within a reasonable time, of the political action afforded government bodies to be taken as indicated in the Court's decision herein." *Bianchi et al.* v. *Griffing et al.*, 238 F. Supp. 997; appeal dism. 382 U. S. 15 (1965).

[fol. 249] Gross inequality of individual voter representation amongst the ten towns of the County scarcely can be disputed. Attempting to follow the precepts of the Supreme Court as they relate to constitutional equal protection of the laws with respect to the voting privilege of the individual citizen, the State courts in many of the counties of New York State have directed that such in-

[File endorsement omitted]

equalities be remedied and have entered judgments hopefully designed for this purpose.* Although the State court in each malapportioned county would seem to have been better able, because of its more intimate knowledge of the local conditions existing therein, to pass upon the particular relief required to remedy any malapportionment situation, nevertheless the constitutional question is properly in the federal court and jurisdiction cannot be sloughed off.

Since "apportionment is primarily a legislative rather than a judicial function," *Graham* v. *Board of Supervisors, Erie County*, 267 N.Y.S. 2d 383, 394, this court had hoped that some definitive action would be taken by the Board of Supervisors to have the Board more equally representative of the voters of the county than is true at the present time. No such action, however, has been taken and plaintiffs, acting under the privilege given to them, in De-
[fol. 250] cember 1965 renewed their application for relief.

A Committee (25 in number) on Re-Apportionment for the County of Suffolk was appointed by the Board. At its first meeting on December 15, 1965 the Commissioner of the New York State Office of Local Government, John J. Burns, presented his views and an outline of a proposed reapportionment plan which maintained the towns as units having one Supervisor each except that one Supervisor was to be added for each 100,000 of population or fraction

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[fol. 263]

* *Seaman* v. *Fedourich*, 258 N.Y.S. 2d 1008; 259 N.Y.S. 2d 1021; 16 N.Y. 2d 94, 262 N.Y.S. 2d 444; 47 Misc. 2d 26, 262 N.Y.S. 2d 591 (Sup. Ct. Broome Co., 1965); *Shilbury* v. *Board of Supervisors, Sullivan County*, 46 Misc. 2d 837, 260 N.Y.S. 2d 931 (Sup. Ct. Sullivan Co. 1965) aff'd 267 N.Y.S. 2d 1022 (Third Dept. 1966); *Augostini* v. *Lasky*, 46 Misc. 2d 1058, 262 N.Y.S. 2d 594 (Sup. Ct. Broome Co., 1965); *Treiber* v. *Lanigan*, 48 Misc. 2d 434, 264 N.Y.S. 2d 797 (Sup. Ct. Oneida Co., 1965), modified 25 A.D. 2d 202 (Fourth Dept. 1966); *Town of Greenburgh* v. *Board of Supervisors*, 266 N.Y.S. 2d 998 (Sup. Ct. Westchester Co., 1966); *Dona* v. *Board of Supervisors*, 266 N.Y.S. 2d 229 (Sup. Ct. St. Lawrence Co., 1966); *Graham* v. *Board of Supervisors, Erie County*, 267 N.Y.S. 2d 383 (Sup. Ct. Erie Co., 1966).

See also, *Lodico* v. *Board of Supervisors of the County of Rockland, et al.*, No. 2361, U.S.D.C. S.D.N.Y., Croake, J., May 20, 1966.

thereof for towns of over 100,000 population. Weighted voting on the basis of one vote for each 10,000 of population was to supply the equal protection element. Counsel Milton Alpert referred to instances where the courts themselves had imposed temporary reapportionment.

A second meeting of the Committee was held on January 4, 1966 at which various members offered suggestions as to a legislative body for the County to be elected at large, elected from assembly districts, elected from supervisor districts to be created, or elected from units of population. Arguments for and against weighted voting were advanced.

At subsequent meetings held on February 2, 1966, March 2, 1966, and March 16, 1966, other ideas as to plans were [fol. 251] presented and discussed. A vote taken at the March 30, 1966 meeting showed a wide range of views as to the basic units for reapportionment and the weighting of votes.

The meeting of May 4, 1966 voted to submit four plans to the Board. In its report dated May 9, 1966, the Committee presented to the Board four recommended plans: (1) Burns-Klein (Weighted Vote); (2) Lazer Plan "A" (Districting); Albertson (At-Large); and (4) Lundberg Plan "A" (Miscellaneous). At its meeting held on May 31, 1966 two of the four plans were preferred but the Board was unable to express a preference between these two. A local law (Local Law Intro. No. 1—1966, Suffolk County, New York) was introduced at a special meeting of the Board on May 31, 1966; the County Attorney is, however, unable to state that the Local Law is likely to be adopted.

The plans for which the County Board indicated a preference were the Albertson and the Klein (or Klein-Burns) plan. The Albertson plan would provide ten supervisors as at present, one from each town. The county supervisor could also hold the office of town supervisor. However, all county supervisors would be elected by county-wide balloting—the voter in Huntington (and every [fol. 252] other town) voting for a slate of ten supervisors, one from each town. Each candidate running county-wide

for county supervisor would also be permitted to run simultaneously in his own town for the office of Town Supervisor. The Klein plan would provide for continuing the ten town supervisors as members of the County Board of Supervisors and would accord each of them one vote for each ten thousand persons in his town; towns having over 100,000 of population would elect a second "county" supervisor, and towns having over two hundred thousand of population would elect a third supervisor. No town would have less than one vote, no supervisor more than ten votes; supervisors from the same town would share the votes equally but odd votes would go to the town supervisor or, if there were three supervisors and two "odd" votes, then to the town supervisor and the "county" supervisor who polled the larger number of votes.

The third plan was the Lazer plan. It would provide twenty county supervisors elected in districts varying in 1960 size between 30,861 and 35,925. The districts would be made up from existing election districts and would cut across town lines. Shelter Island, Southold and Riverhead would share one supervisor and Southampton and Easthampton would share one supervisor.

[fol. 253] The fourth plan was the Lundberg Plan A. It would continue the ten town supervisors and each would have one vote at County meetings. In addition, ten "county coordinators" in addition to a county executive would be elected at large in the county. The County coordinators would do all the legislative committee work and each would have a single vote in county meetings, the County Executive continuing, as now, to have a tie-breaking vote. The theory of Plan A is that no combination of supervisors' votes could prevail over the votes of county-wide representatives and, presumptively, the large-town votes would be reinforced by large-town influence in the electoral selection of the county coordinators.

A Lundberg Plan B would have retained a county board of ten but would elect the members at large; the County Executive's tie-breaking vote and veto would continue as in

the present charter. Membership on the county board would be made incompatible with holding town office.

Local Law Intro. No. 1 would continue the town supervisors as the membership of the county board and give each a vote equal to his town's census population divided by 10,000 except that no town supervisor should have less [fol. 254] than one vote nor more than half the total votes of the board. Each supervisor would have one vote on selection of a presiding officer, presence of a quorum, rules of procedure and their amendment or repeal, and adjournment. The tie-breaking vote of the County Executive would be continued.

The Albertson plan would appear not to rectify but to perpetuate the malapportionment that now exists. The Klein plan, while it would add certain "county" supervisors, in effect, gives to the supervisors, town and county, votes equal to each 10,000 of population or weighted voting.

It is not for the courts to decree the kind of legislative body which should govern the people of Suffolk County. The courts' function should be limited to guaranteeing to the voters that the vote of their representative will be as nearly equal to that of every other voter as may be possible. Although the current trend in reapportionment has been in the direction of mere numerical equality, there well may be other factors of importance to be considered. Thus, in a county in which the town has been the unit for over 200 years, there may be good and sufficient reasons for the preservation of these units. Consistent with such [fol. 255] preservation might be the super-imposition of a legislative body for the county, quite apart from the towns. New supervisory districts might seem preferable to the voters as an equalization measure. In any party system of government, selection of candidates will be a factor. To date the Town Supervisor plays two roles, one as Chief Executive of the Town, the other as a member of the County Board. Proper representation may call for his presence on the County Board to speak for his Town but

his right to speak for his Town should not carry with it a widely disproportionate voting power. Under present laws both Town and County governing bodies have specified powers. To the extent that these County-wide functions affect every resident of the County, they should be exercised by a body elected on a basis as nearly equal as possible.

The court is not unmindful of the unique situation which has developed in the County over the last decade or an even longer period. The extraordinary population increase and the urbanization of the western part of the County have created the problem now before us. The population figures with respect to the towns of the eastern section of the County attest to no such expansion as yet. In short the court can take judicial notice of the present [fol. 256] character of the County as being urban and industrial in the western portion and rural and agricultural in the eastern. Insofar as these differences affect the towns themselves, the town governments must, and undoubtedly will, deal with them as they and their local constituents desire. The problem now before us relates only to the overall County functions and the County legislative body to legislate as to them. As previously mentioned, in the selection of this body there well may be considerations other than mere numerical equality although this must be accepted as the primary factor from which a radical departure would lead to a court rejection as unconstitutional.

This outline of the problems as they appear to the court and of the action taken thus far is intended as a background for decision. It is obvious to the court that there must be a change in the voting power of each of the present County supervisors so as to give to the voter more equal representation in his vote. The Committee on Re-Apportionment has shown by its conscientious endeavors in the debating and drafting of the several plans mentioned a genuine awareness of the problems facing them. "It must be recognized that officials committed with the responsi- [fol. 257] bility of devising a proper method of apportion-

ment are operating in a very difficult and rather novel field of the law, * * *." *Shilbury* v. *Board of Supervisors, Sullivan County*, 46 Misc. 2d 837, 842-843, 260 N. Y. S. 2d 931, 937, (1965). Aff'd 267 N. Y. S. 2d 1022 (1966).

During the many months of deliberation, the Board has been mindful of the various methods suggested for a solution, both because of the presence of Board members on the Committee and the actual presentation to it of the four plans. As the Board is now constituted, its voting power is not truly representative of the voter of the County at large. The adoption of any plan or plans and the submission thereof to the voters at the next (November 1966) election by the Board on the present basis of one vote per town would be tainted with the infirmity of the existing malapportionment. In taking such action as to a plan for proper representation, the present Board should speak for the County. The court does not imply that each individual member of the Board has not given his best judgment in his vote on County-wide matters, but the fact remains that the single vote of the representative of 1,300 voters and the same single vote of the representative of 170,000 voters is not equal voter representation. Therefore, to give to the County at once, because immediate action is imperative, [fol. 258] representation by its presently constituted Board in the formulation and submission to the voters of a plan or plans, the voting power of each member of the Board must be adjusted so as to better speak for the residents of their respective towns.

The federal courts will do well in dealing with such local matters as are thrust upon them to be guided by, and to give due deference to, the decisions of the State courts dealing with similar problems. Fortunately, there have been many such decisions by the courts of New York. In these cases the form of the judgment or decree in substance has been to direct the Boards of Supervisors to adopt a legal, valid and constitutionally acceptable plan which will enable the voters at the next election, at which supervisors

or a corresponding legislative body would be elected, to elect their county representatives.

In *Seaman* v. *Fedourich*, 47 Misc. 2d 26 (1965) on remand after the decision by the New York Court of Appeals, 16 NY 2d 94 (1965), the Common Council of Binghamton was directed to "adopt and submit to this court for approval a districting plan, which, in good faith, is intended to meet constitutional requirements of equal representation;" (p. [fol. 259] 29). In both the Binghamton and the Sullivan County (*Shilbury, supra*) cases, to use two for illustrative purposes, the courts decreed weighted voting by the present Boards of Supervisors "as a stopgap or temporary measure" to "redress disparities" (*Shilbury*) until a permanent plan became effective.

Although there are differences of opinion as to the practical advisability and the legality of weighted voting, it has the merit that it can be made effective at once and if recognized as a temporary stopgap will give to the voter only that qualitative protection to which he is entitled. However, the New York courts have stressed weighted voting as a "temporary" expedient to be used until a permanent plan is adopted. Doubt as to weighted voting was expressed in *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (U.S. D.C. S.D. N.Y. 1965). Furthermore, there may be a real question as to whether the concentration of votes in one or more supervisors does more than create a monolithic voting power, which might be avoided by employing other means that would equate population with representation, such as, for example, districting a town for electoral purposes or invoking proportional representation. [fol. 260] This court recognizes that the terms valid, legal or constitutionally acceptable cannot take on such a character until some court of last resort has conferred this status upon them. Witness the situation in *Lucas* v. *Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713 (1964). The direction to submit a plan or plans to

this Court for approval may not be an ending but at least it will be a beginning. In final analysis (subject to conformity with constitutional requirements, see *Lucas, supra*), the people of the County should have the right to express their preference as to the legislative body which is to govern their county. However, for the present, it is sufficient to conform the voting strength of the Board members to the population represented. The most arithmetical method would be to give each Board member a vote equalling that fraction obtained from a numerator of his Town's, and a denominator of the County's, total population using the 1960 federal census. Since a weighted vote is to be only a stopgap until a permanent plan is formulated, approved and adopted, an assignment to each supervisor of a number of votes equal to the number, to the nearest whole number, obtained by dividing the population [fol. 261] of his Town (1960 federal census) by 5,000, providing that no supervisor shall have less than one vote, should serve better to equalize the voting strength of the various areas of the County.

A time schedule is important. The discussions during the past months have undoubtedly enabled the pros and cons of the various plans proposed to be considered. There must ultimately be a time for decision. Therefore, from and after the filing of this opinion the votes of the present Board shall be counted as herein indicated continuing in this manner until a permanent plan shall have been adopted. On or before July 11, 1966, the Board shall present a plan to this court, copies thereof to be served on all parties to the proceeding, which the Board proposes to adopt as an amendment of the Suffolk County Charter acting within the powers conferred upon the Board therein and for submission to the electorate of the County at the November 1966 election; or, in the event that the Board wishes to present two or more plans to the electorate at said election, such plans shall be so submitted. Objections to any plan or plans so submitted may be filed with this court on or before July 18, 1966.

[fol. 262] An order consistent with this opinion is being entered forthwith and this Court will retain jurisdiction of the proceedings, both to review the plan or plans submitted and for such further relief as may become necessary or appropriate in connection with the implementation of this order.

Leonard P. Moore, U.S.C.J.; Walter Bruchhausen, U.S.D.J.; John F. Dooling, Jr., U.S.D.J.

Brooklyn, New York
June 15, 1966.

[fol. 264]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

I. WILLIAM BIANCHI, JR., and
QUENTIN B. SAMMIS, Plaintiffs,

—against—

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, Defendants.

ORDER AND JUDGMENT—June 15, 1966

The Board of Supervisors having moved to dismiss the complaint, or dissolve the statutory court, or permit the defendants to file an amended answer, or for summary judgment, it is.

[File endorsement omitted]

Ordered and Adjudged

1. That Section 203 of the Suffolk County Charter is invalid as applied because it is in conflict with the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution and Sections 1 and 11 of Article 1 of the New York Constitution;

2. That commencing June 15, 1966, and continuing until the Board of Supervisors is reconstituted under a constitutionally valid plan each present supervisor and his successors shall cast at meetings of the Board of Supervisors (other than on a vote to determine whether or not to appeal from this order and on any appeal therefrom) a number of votes equal to the quotient of the population of his Town (1960 federal census) by 5,000 to the nearest whole number, providing, however, that no supervisor shall have less than one vote.

[fol. 265] 3. That the Board of Supervisors and such other persons or entities as may have authority to do so under the Laws and Constitution of New York submit on or before July 11, 1966, to the Court a plan or plans for reconstitution of the Board of Supervisors or other County legislative body, and providing for submission of the plan or plans to the electorate of the County at the November 1966 general election so that a Board of Supervisors or other legislative body may be elected pursuant to a plan thus adopted to take office no later than January 1, 1968, and upon such submission the Court will order an immediate hearing to determine whether or not it is reasonably probable that the plan or plans, if adopted, would be found valid; and

4. That this Court retains jurisdiction to review the plan or plans submitted pursuant to paragraph 3 and for such further relief as may become appropriate in connection with the implementation of this order.

Leonard P. Moore, U.S.C.J.; Walter Bruchhausen, U.S.D.J., John F. Dooling, Jr., U.S.D.J.

Brooklyn, New York
June 15, 1966

[fol. 309]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

MOTION OF TOWN OF SOUTHAMPTON TO INTERVENE AS A DEFENDANT UNDER RULE 24 AND FOR A STAY UNDER RULE 62—Filed June 28, 1966

Sirs:

Please Take Notice that, upon the affidavit of Robert B. Vojvoda, sworn to June 25, 1966, the proposed Answer attached hereto, the resolution of the Town Board of the Town of Southampton adopted June 21, 1966, the resolutions of the Town Board of the Town of East Hampton of June 22, 1966, the resolution of the Town Board of the Town of Riverhead adopted June 23, 1966, the resolution of the Town Board of the Town of Southold adopted June 23, 1966, the resolution of the Town Board of the Town of Shelter Island adopted June 24, 1966, the pleadings herein filed, the decisions and orders of this Statutory Court herein made and filed, and upon all the prior papers and proceedings had herein, The Town of Southampton, its supervisor Robert T. Cameron; The Town of East Hampton, its supervisor Edward V. Ecker; The Town of Riverhead, its supervisor Robert B. Vojvoda; The Town of Southold, its supervisor Lester M. Albertson; and The Town of Shelter Island, its supervisor Evans K. Griffing, [fol. 310] shall move this Court on June 28, 1966, at the United States Courthouse for the Eastern District of New York (Courtroom of Hon. Walter Bruchhausen) at 10 o'clock in the forenoon for an Order granting the following relief:—

1. For leave to intervene as defendants in this action in order to assert the rights of the Towns of Southampton, East Hampton, Riverhead, Southold, Shelter Island, and their respective supervisors, which are set forth in the

answer of said Towns and supervisors dated June 25, 1966 attached hereto, on the ground that the representation of the interest of said Towns and their respective supervisors by the existing parties is and has been inadequate since the Order herein dated June 15, 1966, and the further ground that the applicants have been aggrieved by the order herein of June 15, 1966, and intervention is necessary and proper in order that the applicants may appeal said order of June 15, 1966 to assert and protect their respective constitutional rights.

2. Upon such intervention, for leave to file with the Clerk of this Court the original of said Answer of the applicants.

3. Amending the caption of the action appropriately to reflect the names of all the parties.

4. Upon intervention, granting to the applicants a stay, pending appeal of the Order of June 15, 1966.

[fol. 311] 5. For such different and further relief as the Court may deem just and proper.

Dated: Riverhead, New York, June 25, 1966.

Yours, etc.

Reginald C. Smith, Pierre G. Lundberg, Howard M. Finkelstein, By Reginald C. Smith, Attorneys for the Towns of Southampton, East Hampton, Riverhead, Southold, and Shelter Island, and their respective supervisors, (Office and Post Office Address) 456 Griffing Avenue, Box 389, Riverhead, New York.

To:

George W. Percy, Jr., Esq., County Attorney, Suffolk County Center, Riverhead, New York.

Frederic Block, Esq., Attorney for Plaintiff, Bianchi, East Main Street, Port Jefferson, New York.

Richard Cahn, Esq., Attorney for Plaintiffs, Sammis and Town of Huntington, 425 New York Avenue, Huntington, New York.

[fol. 312]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ROBERT B. VOJVODA IN SUPPORT OF MOTION

State of New York,
County of Suffolk, ss.:

Robert B. Vojvoda, being duly sworn, deposes and says:

I am the Supervisor of the Town of Riverhead, New York, and have acted as such for more than two years last past.

This affidavit is made in support of a motion by the five eastern towns of Suffolk County, New York, and the five supervisors thereof, for the relief prayed for in the annexed notice of motion dated June 25, 1966.

On the 23rd day of June, 1966, after due notice, the Board of Supervisors of Suffolk County directed the County Attorney to appeal from the said order to the Supreme Court of the United States. The County Attorney is now in the process of preparing the notice of appeal. I am advised that it will likely be filed and served on Tuesday, June 28th.

The towns of East Hampton, Riverhead, Shelter Island, Southampton and Southold have each retained the firm of Smith, Tasker, Finkelstein and Lundberg to make this [fol. 313] application, as is indicated by copies of the resolutions annexed hereto and made a part hereof.

The Town of Huntington heretofore, and on the 16th day of December, 1965, has been granted the right to intervene as a plaintiff, and did intervene and adopted the complaint of the plaintiffs as their pleading before this court. The Town of Huntington has participated, thereafter, in this action. The court is advised that, unfortunately, during the last eight years, and since the adoption

of the Suffolk County Charter, there has grown animosity between the representatives of the five eastern town and the five western towns. This animosity, and the jealousy which accompanied it, has increased in tempo since the decision in the Supreme Court of the United States in *Baker* v. *Carr*. At the meeting of the Board of Supervisors on June 23rd, the ten supervisors, who were, prior to that time, friendly and kindly toward one another, became unfriendly, unkindly, acrimonious, vicious and irrational in their attitudes and in their statements toward one another and in their voting.

The court had ordered that, for the purpose of considering an appeal, the vote should be under the old method of one vote for one town. Upon the question of appeal, the five eastern towns voted to appeal, and they were joined by the Supervisor of the Town of Brookhaven, and the motion to appeal was ordered. Thereafter, on a motion for an application for a stay, the five eastern towns voted to apply for a stay, and the five western towns voted against it, and the motion was lost. Thereafter, having ordered the County Attorney to appeal, and having been advised by the County Attorney that his staff was already overworked with the burgeoning volume of court problems and a need [fol. 314] for special counsel on appeal to the Supreme Court of the United States, the five western supervisors voted against the resolution to appoint an additional county attorney.

The five eastern towns of Suffolk County have more than a hundred miles of salt water shore front. There are numerous fresh water ponds, rivers, creeks, marshes and "wetlands". During the last few years, and under pressure from the County Executive and Planning Consultant, the County has condemned thousands of acres of park lands in the five eastern towns. On January 6, 1966, the County Executive and the Planning Consultant issued an "Annual Report to the Suffolk County Board of Supervisors". In this report, the County Executive proposed that the Board

of Supervisors condemn, for county park purposes, six large parcels in the Town of East Hampton, two in the Town of Southold, two in the Town of Riverhead, and five in the Town of Southampton, constituting at least 5,000 acres of land, many acres of which were not either "wetlands" nor marshes. In the last few weeks, the County Executive, on the urging of the Planning Consultant, has proposed to take, for park purposes, one-third of the taxable real estate in the Town of Shelter Island. The grandiose schemes of the County Executive and the Planning Consultant have been held in check, to some extent, by the objection of these five eastern supervisors, and since the decision of this court on June 15th the County Executive has expressed himself as saying that he will now be able to go ahead with many of the projects that have been heretofore held up.

[fol. 315] I am advised by our attorneys, and by the County Attorney, that if the weighted vote, directed by the order, is continued for another eight months, and bond issues are passed and money is borrowed for county purposes under the weighted vote and over the negative votes of the five eastern supervisors, taxpayers' suits are anticipated before the estoppel dates occur, and even though the Board operates under this order with a de facto power, the record cannot be protected in the event of a reversal by the Supreme Court of the United States.

For more than five years last past, there has been some agitation in the western towns and a great agitation in the eastern towns for the splitting of Suffolk County into two counties. As the various decisions have been handed down since the *Baker* case, the agitation for the split has increased in tempo. There are a great many advantages that could come to the five eastern towns by separating, and it is evident to anyone that there are many disadvantages which would be created by the split. The operation under the order of June 15th, for any number of months, is likely to provoke an organized effort to split the county.

There are approximately 90,000 people in these five eastern towns, and they are growing, though not nearly as fast as the five western towns. I predict that they will have, in these five eastern towns within a few years, sufficient population to enable them to split the county.

I state, most respectfully, that in the event of the operation for the next eight months under this order and a reversal, irreparable injury will be suffered by the whole county.

[fol. 316] Our attorneys have advised us that the court, in the *Reynolds* case, has indicated that the rule in the *Baker* case does not apply to the subdivisions of the state, and that they do fairly anticipate a reversal of the order of June 15th. The five eastern supervisors in the five eastern towns ask that they be permitted to intervene for the purpose of appealing to the Supreme Court of the United States and for the purpose of participating in the proceedings before this court, anticipated on July 19th. We feel that we have a right to support the County Attorney on an appeal, and we feel that the history of these five eastern towns has not been adequately emphasized. These towns were created as such before 1700, before there was a colony, before there was a county, before there was a state, and long before there was a United States of America. Three of the five have "Trustees of the Proprietors of the Commonalty" who, in their trust capacities, own and govern the bottoms of the creeks and bays, and these Trustees and these corporate entities, apart from the towns themselves, have been recognized in every constitution of the State of New York. The third reason in equity for permission to intervene is that the Town of Huntington has been permitted to do so.

The stay is asked for the following reasons:—

(a) that the reversal of the order of June 15th is probable.

(b) that the harm to be suffered by the five western towns, and the people thereof, during the next eight months, is inconsequential.

[fol. 317] (c) that the borrowing capacity of the County during the next six months, and its credit standing, will be greatly impaired.

(d) that the condemnation of thousands of acres of taxable lands of the eastern towns, for the invasion of the half million people of the western towns, is imminent.

(e) that, in the event of a split of the County after a number of years of operation under such a weighted vote, and the condemnation of our taxable lands, the people of these towns would continue to be burdened in the payoff of the bonds for thousands of acres of park that they do not need.

(f) that there is a reluctance of this court to impose a single plan to be accepted or rejected by the people in November.

(g) that the Board of Supervisors is unable and apparently unwilling to join in any one plan.

(h) that the placing of a plan on a ballot for November by this court, without the approval of the Board of Supervisors, and an acrimonious campaign in November, is likely to cause irreparable damage to the county government of the county.

(i) that the reversal by the Supreme Court, after the plan is placed on the ballot, will produce great embarrassment to the municipal government of the County of Suffolk.

(j) that the imposition by the four western supervisors of the hardships anticipated to be suffered by the five eastern towns will surely cause the splitting of Suffolk County into two counties.

[fol. 318] (k) I am advised that the decision in the Baker case and the decision in this case are predicated upon the constitutional right of everyone to have an equal vote under the law. If Suffolk County is operated under this order, with the present attitude of the four western supervisors,

during the next year, the 90,000 people in eastern Suffolk will not only not have a fair and equal vote, they will have no vote.

Robert B. Vojvoda

Sworn to before me this 25th day of June, 1966.

Marjorie E. Edwards, Notary Public, State of New York, No. 52-1080430, Suffolk County, Commission Expires March 30, 1967.

[fol. 319]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

62 C 821

I. WILLIAM BIANCHI, JR. and QUENTIN B. SAMMIS, Plaintiffs,

—against—

EVANS K. GRIFFING, ET AL., constituting the Board of Supervisors of Suffolk County, New York, Defendants.

PROPOSED ANSWER OF DEFENDANTS, TOWN OF SOUTHAMPTON, its supervisor ROBERT T. CAMERON; TOWN OF EAST HAMPTON, its supervisor EDWARD V. ECKER; TOWN OF RIVERHEAD, its supervisor ROBERT B. VOJVODA; TOWN OF SOUTHOLD, its supervisor LESTER M. ALBERTSON; and TOWN OF SHELTER ISLAND, its supervisor EVANS K. GRIFFING.

The aforesaid defendants answer the complaint as follows:

First Defense

This Court lacks jurisdiction on the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

Chapter 278 of the Laws of New York 1958 does not violate the Constitution of the State of New York.

[fol. 320] Fourth Defense

New York Constitution Article IX and New York County Law Article 6-A (both as in effect at the time of the commencement of this action) do not violate the Constitution of the United States. The People of Suffolk County, voting in 1958 on the question of the adoption of the Suffolk County Charter pursuant to the provisions of Chapter 278 of the Laws of New York 1958, overwhelmingly approved the method provided therein for electing the members of the legislative body of Suffolk County.

Fifth Defense

There is no right under the Constitution of the United States or the Constitution of the State of New York guaranteeing to forms of local government below the state level, whether elected or appointed, and whether possessed of delegated legislative power or not, a republican form of government.

Sixth Defense

The granting of injunctive relief enjoining the defendants from acting in their collective capacity as the Board of Supervisors of Suffolk County until a constitutional change in their voting strength is made would deprive Suffolk County of all effective government and cause conditions that would be contrary to the best interest of the people thereof.

Seventh Defense

1. Defendants deny the allegations of paragraphs 7, 11, 12, 13, 18 and 19 of the complaint; admit the allegations of paragraphs 1, 2, 3, 4, 6, 8, 9, 10 and 16.

[fol. 321] 2. Defendants admit the allegations of paragraph 5 of the complaint, except that they deny members of the Suffolk County Board of Supervisors act as state officers.

3. Defendants deny the allegations of paragraph 14 of the complaint except they admit the revenues referred to are derived as stated.

4. Defendants deny the allegation of paragraph 15 except they admit the reasons alleged in part for the unequal growth rate and accept the characterizations of the eastern and western townships as being substantially correct.

Wherefore, defendants demand judgment that the complaint herein be dismissed, and that they have their costs and disbursements of this action.

Reginald C. Smith, Pierre G. Lundberg, Howard M. Finkelstein, By Reginald C. Smith.

Riverhead, New York, June 25, 1966.

RESOLUTION

[fol. 322] Resolved that the Town of Southampton or its supervisor, make a proper application to intervene as a party in the pending action in the federal courts of *Bianchi* v. *Griffing, et al.* for the purpose of appealing the June, 1966 order, or orders of the District Court, Eastern District of New York to the Supreme Court of the United States and applying for a stay of said order pending such appeal, and it is further

Resolved that the Town of Southampton does hereby retain Smith, Tasker, Finkelstein and Lundberg, Esqs., 456 Griffing Avenue, Riverhead, New York for the purposes of applying to intervene, appealing said order and apply-

ing for a stay of said order pending appeal and that said attorneys shall be paid a reasonable compensation for such legal services to be performed by them on behalf of the Town of Southampton.

Robert T. Cameron, Supervisor; M. C. Hendrick, Justice of the Peace; William F. McCoy, Justice of the Peace; (Signature illegible), Justice of the Peace; Paul H. Smith, Jr., Justice of the Peace; John P. Martin, Justice of the Peace.

Certificate of Clerk of Town of Southampton (omitted in printing).

[fol. 323] June 22nd, 1966

SPECIAL MEETING OF THE TOWN BOARD, TOWN OF EAST HAMPTON.

The following resolution was offered by Justice Topping, seconded by Councilman Strong and unanimously adopted:

Resolved, that the Town Board of the Town of East Hampton, New York hereby authorizes Supervisor Edward V. Ecker to take the necessary steps, along with the Supervisors of the other four (4) eastern towns, those being Riverhead, Southold, Southampton, and Shelter Island, to appeal the decision of the Special Three-Man-Federal Court on the Re-Apportionment of Suffolk County, if the Board of Supervisors fails to act. The proportionate cost of such litigation to be borne by the Town.

Certificate Town Clerk of East Hampton (omitted in printing).

RESOLUTION.

[fol. 324] Resolved that the Town of East Hampton or its supervisor, make a proper application to intervene as a party in the pending action in the federal courts of *Bianchi* v. *Griffing, et al.* for the purpose of appealing the June, 1966 order, or orders of the District Court, Eastern District of New York to the Supreme Court of the United

States and applying for a stay of said order pending such appeal, and it is further

Resolved that the Town of East Hampton does hereby retain Smith, Tasker, Finkelstein and Lundberg, Esqs., 456 Griffing Avenue, Riverhead, New York for the purposes of applying to intervene, appealing said order and applying for a stay of said order pending appeal and that said attorneys shall be paid a reasonable compensation for such legal services to be performed by them on behalf of the Town of East Hampton.

Certificate of Town Clerk of East Hampton (omitted in printing).

RESOLUTION

[fol. 325] Resolved that the Town of Riverhead or its supervisor, make a proper application to intervene as a party in the pending action in the federal courts of *Bianchi* v. *Griffing, et al.* for the purpose of appealing the June, 1966 order, or orders of the District Court, Eastern District of New York to the Supreme Court of the United States and applying for a stay of said order pending such appeal, and it is further

Resolved that the Town of Riverhead does hereby retain Smith, Tasker, Finkelstein and Lundberg, Esqs., 456 Griffing Avenue, Riverhead, New York for the purposes of applying to intervene, appealing said order and applying for a stay of said order pending appeal and that said attorneys shall be paid a reasonable compensation for such legal services to be performed by them on behalf of the Town of Riverhead.

Dated: June 23, 1966

Robert B. Vojvoda, Supervisor, (Signature illegible), Justice of the Peace, Thomas R. Costello, Justice of the Peace, Vincent B. Grodski, Councilman, George G. Young, Councilman.

Certificate of Town Clerk at Riverhead (omitted in printing).

[fol. 326]

RESOLUTION

Special Meeting of the Town Board of the Town of Southold, Suffolk County, New York, held at the office of the Supervisor, Lester M. Albertson, 16th South Street, Greenport, New York, on Thursday, June 23, 1966.

Resolved that the Town of Southold or its Supervisor, make a proper application to intervene as a party in the pending action in the federal courts of *Bianchi* v. *Griffing, et al.* for the purpose of appealing the June, 1966 order, or orders of the District Court, Eastern District of New York to the Supreme Court of the United States and applying for a stay of said order pending such appeal, and it is further

Resolved that the Town of Southold does hereby retain Smith, Tasker, Finkelstein and Lundberg, Esqs., 456 Griffing Avenue, Riverhead, New York for the purposes of applying to intervene, appealing said order and applying for a stay of said order pending appeal and that said attorneys shall be paid a reasonable compensation for such legal services to be performed by them on behalf of the Town of Southold.

Vote of Town Board: Ayes—Supervisor Lester M. Albertson, Councilman Howard C. Valentine, Councilman Louis M. Demarest, Justice E. Perry Edwards, Justice Ralph W. Tuthill, Justice Henry A. Clark.

Certificate of Town Clerk of Southold (omitted in printing).

RESOLUTION

[fol. 326a] Emblem

Town of Shelter Island
Shelter Island
New York

Resolved that the Town of Shelter Island, or its Supervisor, make a proper application to intervene as a party

in the pending action in the federal courts of Bianchi v. Griffing et al, for the purpose of appealing the June, 1966 order, or orders of the District Court, Eastern District of New York to the Supreme Court of the United States and applying for a stay of said order pending such appeal, and it is further

Resolved, that the Town of Shelter Island does hereby retain Smith, Tasker, Finkelstein and Lundberg, Esqs., 456 Griffing Avenue, Riverhead, New York for the purposes of applying to intervene, appealing said order and applying for a stay of said order pending appeal and that said attorneys shall be paid a reasonable compensation for such legal services to be performed by them on behalf of the Town of Shelter Island.

Certificate of Town Clerk of Shelter Island (omitted in printing).

[fol. 326b] Affidavit of Service (omitted in printing).

[fol. 326c] Affidavit of Service by Mail (omitted in printing).

[fol. 327]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF DEFENDANTS, TOWN OF SOUTHAMPTON, its supervisor ROBERT T. CAMERON; TOWN OF EAST HAMPTON, its supervisor EDWARD V. ECKER; TOWN OF RIVERHEAD, its supervisor ROBERT B. VOJVODA; TOWN OF SOUTHOLD, its supervisor LESTER M. ALBERTSON; and TOWN OF SHELTER ISLAND, its supervisor EVANS K. GRIFFING—Filed June 28, 1966

The aforesaid defendants answer the complaint as follows:

[File endorsement omitted]

First Defense

This Court lacks jurisdiction on the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

Chapter 278 of the Laws of New York 1958 does not violate the Constitution of the State of New York.

[fol. 328] Fourth Defense

New York Constitution Article IX and New York County Law Article 6-A (both as in effect at the time of the commencement of this action) do not violate the Constitution of the United States. The People of Suffolk County, voting in 1958 on the question of the adoption of the Suffolk County Charter pursuant to the provisions of Chapter 278 of the Laws of New York 1958, overwhelmingly approved the method provided therein for electing the members of the legislative body of Suffolk County.

Fifth Defense

There is no right under the Constitution of the United States or the Constitution of the State of New York guaranteeing to forms of local government below the state level, whether elected or appointed, and whether possessed of delegated legislative power or not, a republican form of government.

Sixth Defense

The granting of injunctive relief enjoining the defendants from acting in their collective capacity as the Board of Supervisors of Suffolk County until a constitutional change in their voting strength is made would deprive

Suffolk County of all effective government and cause conditions that would be contrary to the best interest of the people thereof.

Seventh Defense

1. Defendants deny the allegations of paragraphs 7, 11, 12, 13, 18 and 19 of the complaint; admit the allegations of paragraphs 1, 2, 3, 4, 6, 8, 9, 10 and 16.

[fol. 329] 2. Defendants admit the allegations of paragraph 5 of the complaint, except that they deny members of the Suffolk County Board of Supervisors act as state officers.

3. Defendants deny the allegations of paragraph 14 of the complaint except they admit the revenues referred to are derived as stated.

4. Defendants deny the allegation of paragraph 15 except they admit the reasons alleged in part for the unequal growth rate and accept the characterizations of the eastern and western townships as being substantially correct.

Wherefore, defendants demand judgment that the complaint herein be dismissed, and that they have their costs and disbursements of this action.

Reginald C. Smith, Pierre G. Lundberg, Howard M. Finkelstein, By Reginald C. Smith.

Riverhead, New York.
June 25, 1966.

[fol. 425]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE BOARD OF SUPERVISORS OF SUFFOLK COUNTY —Filed June 30, 1966.

I. Notice Is Hereby Given that The Board of Supervisors of Suffolk County, New York, defendant above named, hereby appeals to the Supreme Court of the United States from the decree, order, and judgment of the Statutory Court herein dated June 15, 1966, adjudging §203 of the Suffolk County Charter to be unconstitutional, granting in part injunctive relief applied for by the plaintiffs, and granting other relief to the plaintiffs, and insofar as said decree, order, and judgment denied defendants' motion to dismiss the complaint, dissolve the Statutory Court, permitting the defendants to file an amended answer, and for summary judgment. This appeal is taken pursuant to 28 U. S. C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in such transcript the following:

[fol. 426] 1) Complaint.

2) Notice of Motion to Dismiss Complaint dated October 17, 1962.

3) Affidavit of Ruth Buys dated October 15, 1962.

4) Affidavit of Arthur M. Cromarty dated October 15, 1962.

5) Decision of Hon. Walter Bruchhausen, D. J., filed April 8, 1963.

6) Order of Hon. Walter Bruchhausen, D. J. denying motion to dismiss complaint, filed June 6, 1963.

7) Notice of Hearing on Plaintiffs' Application for an Injunction filed August 6, 1963.

8) Notice of Motion to Dismiss Complaint dated September 5, 1963.

9) Letter of Hon. Louis J. Lefkowitz, Attorney General, dated September 25, 1963.

10) Decision of Statutory Court dated February 1, 1965.

11) Order and Judgment of Statutory Court dated March 3, 1965.

12) Notice of Appeal filed April 2, 1965.

13) Transcript of hearing of September 30, 1963, filed May 21, 1965.

14) Certified copy of order of the Supreme Court of the United States dated November 10, 1965.

15) Plaintiffs' Notice of Motion dated December 7, 1965.

16) Notice of Motion of the Town of Huntington to intervene dated December 15, 1965.

17) Defendants' cross-motion to dismiss the complaint and for other relief dated January 7, 1966.

18) Transcript of the hearing held December 16, 1965.

19) Affidavit of John P. Kane dated February 9, 1966.

20) Affidavit of John P. Kane dated February 10, 1966.

[fol. 427] 21) Answer of Defendant, filed March 22, 1965.

22) Transcript of hearing held June 2, 1966.

23) Decision dated June 15, 1966.

24) Order and Judgment dated June 15, 1966.

25) Transcript of hearing June 21, 1966.

26) Notice of Motion to intervene of the Town of Southampton, et al, dated June 25, 1966, and attached affidavits.

27) Answer of Defendants-Interveners filed June 28, 1966.

28) Transcript of hearing held June 28, 1966, and Order of the Court included therein.

29) Notice of Appeal of Defendants-Interveners.

30) This Notice of Appeal.

III. The following questions are presented by this appeal:

1) Did the Three-Judge District Court have before it a substantial federal question? Was there a justiciable controversy over which jurisdiction could have been properly asserted?

2) Does the rationale of the reapportionment decisions of the Supreme Court apply to counties and other forms of municipal government?

A. Do the constitutional provisions of Amendment 10 and Article 4, Section 4, act as a bar to this suit?

B. Should the District Court have ruled that appellees had a plain and adequate remedy at law, so as to act as a bar to the Court's failure to dismiss the complaint on the ground it lacked jurisdiction?

3) Do apportionment standards which apply to congressional representation and state legislatures also apply to counties and other local municipalities and agencies exercising delegated legislative functions?

4) Did the District Court err in adjudging Section 203 of the Suffolk County Charter is invalid as applied because it is in conflict with Sections 1 and 11 of Article 1 of the New York State Constitution?

[fol. 428] 5) Did the District Court err in adjudging Chapter 278 of the Laws of New York, 1958, and particularly Section 203 of the Suffolk County Charter invalid as applied, because it is in conflict with the equal protection clause of Section 1 of the Fourteenth Amendment of the United States Constitution?

6) Did the District Court err in granting the plaintiffs injunctive relief and in denying defendant's motions for summary judgment dismissing the complaint and other relief?

Dated: Riverhead, New York, June 30, 1966.

George W. Percy, Jr., Suffolk County Attorney, Attorney for Defendant, Board of Supervisors, Office & Post Office Address, Suffolk County Center, Riverhead, N. Y. 11901, 516 727-4700 Ext. 336, By: Stanley S. Corwin, Assistant County Attorney.

AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 429]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY TOWN OF SOUTHAMPTON, ET AL.—Filed June 30, 1966

I. Notice is hereby given that the Town of Southampton, Town of East Hampton, Town of Riverhead, Town of Southold, Town of Shelter Island, Robert T. Cameron, individually and as Supervisor of the Town of Southampton; Edward V. Ecker, individually and as Supervisor of the

[File endorsement omitted]

Town of East Hampton; Robert B. Vojvoda, individually and as Supervisor of the Town of Riverhead; Lester M. [fol. 430] Albertson, individually and as Supervisor of the Town of Southold, and Evans K. Griffing, individually and as supervisor of the Town of Shelter Island, the defendants-intervenors, above named, hereby appeal to the Supreme Court of the United States from the order, decree and judgment of the Three-Judge District Court dated and entered June 15, 1966, granting in part an interlocutory injunction altering the form of government of the County of Suffolk, New York, mandating immediate weighted voting, and public referendum for a permanent change of county government, and adjudging the Suffolk County Charter to be unconstitutional under both the United States Constitution and the New York Constitution and granting other relief to the plaintiffs and denying defendant, Board of Supervisors, motions to dismiss the complaint, dissolve the statutory court, permit the filing of an amended answer or for summary judgment and from each and every part of the aforesaid order.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

1. Complaint.

2. Notice of Motion to Dismiss Complaint dated October 17, 1962.

3. Affidavit of Ruth Buys dated October 15, 1962.

4. Affidavit of Arthur M. Cromarty dated October 15, 1962.

[fol. 431] 5. Decision of Hon. Walter Bruchhausen, D. J., filed April 8, 1963.

6. Order of Hon. Walter Bruchhausen, D.J. denying motion to dismiss complaint, filed June 6, 1963.

7. Notice of Hearing on Plaintiffs' Application for an Injunction filed August 6, 1963.

8. Notice of Motion to Dismiss Complaint dated September 5, 1963.

9. Letter of Hon. Louis J. Lefkowitz, Attorney General, dated September 25, 1963.

10. Decision of Statutory Court dated February 1, 1965.

11. Order and Judgment of Statutory Court dated March 3, 1965.

12. Notice of Appeal filed April 2, 1965.

13. Transcript of hearing of September 30, 1963, filed May 21, 1965.

14. Certified copy of order of the Supreme Court of the United States dated November 10, 1965.

15. Plaintiffs' Notice of Motion dated December 7, 1965.

16. Notice of Motion of the Town of Huntington to intervene dated December 15, 1965.

17. Defendants' cross-motion to dismiss the complaint and for other relief dated January 7, 1966.

18. Transcript of the hearing held December 16, 1965.

19. Affidavit of John P. Kane dated February 9, 1966.

20. Affidavit of John P. Kane dated February 10, 1966.

21. Transcript of hearing held June 2, 1966.

22. Decision dated June 15, 1966.

23. Order and Judgment dated June 15, 1966.

[fol. 432] 24. Transcript of hearing June 21, 1966.

25. Notice of Motion to intervene of the Town of Southampton, et al., dated June 25, 1966, and affidavit of Robert B. Vojvoda, dated June 25, 1966, and accompanying exhibits.

26. Transcript of hearing held June 28, 1966, and Order of the Court included therein.

27. Answer of defendant, Board of Supervisors, filed March 22, 1965.

28. Answer of Defendants-Intervenors, filed June 28, 1966.

29. This Notice of Appeal and Notice of Appeal of defendant, Board of Supervisors, filed simultaneously herewith.

III. The following questions are presented by this appeal:

1. Whether the form of government of the County of Suffolk, New York, and the municipal subdivisions or individual voter representation therein is a matter of Federal constitutional jurisdiction or significance?

2. Assuming Federal constitutional jurisdiction and significance, do the apportionment requirements for individual voters mandated by the Supreme Court in the congressional district and state legislative decisions apply to Suffolk County government?

3. Assuming Federal jurisdiction and standards, was the remedy of the three-judge District Court proper in ordering the immediate change from one vote for each of ten town Supervisors to weighted voting, and the forced referendum on a permanent change of county government devised by such weighted Board of Supervisors or others?

[fol. 433] 4. Was it proper for the Three Judge District Court to find the Suffolk County Charter and government unconstitutional under New York State Law?

5. Was the procedure adopted below jurisdictionally defective, inappropriate or insufficient where grave issues were determined and drastic remedies mandated?

Dated: Riverhead, New York, June 30, 1966.

Reginald C. Smith, Pierre G. Lundberg, Howard M. Finkelstein, By: Howard M. Finkelstein, Attorneys for Defendants-Intervenors, Office and Post Office Address, 456 Griffing Avenue (P.O. Box 389), Riverhead, New York 11901, 516 727-4100.

AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 434]

SUPREME COURT OF THE UNITED STATES

No. 491, October Term, 1966

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, ET AL., Appellants,

v.

I. WILLIAM BIANCHI, JR., ET AL.

ORDER NOTING PROBABLE JURISDICTION—December 5, 1966

Appeal from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 624.

December 5, 1966